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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA; and ELMER H. WINTER, *et al.*,

Petitioners,

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA; and JOSEPH N. ALEXANDER, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a fundamental change in interpretation of the critical surplus land act begun by a District Court just prior to the state court decision at issue, but only subsequently adopted by the Circuit Court of Appeals and more fully expanded in later litigation, constitutes a sufficient change in law to preclude application of collateral estoppel on the basis of that state court decision.

2. Whether the doctrine of collateral estoppel should be applicable where the essential purposes of the doctrine and related considerations are not substantially served by its application.

LIST OF PARTIES BELOW

The parties to the proceedings in the Court of Appeals were as follows: The Counties of Mahnomen, Clearwater, and Becker, Minnesota; Elmer H. Winter, Kenneth Albertson, Joe Klinkbomme, and Ed Graham; the State of Minnesota and two of its officials — Joseph N. Alexander, Commissioner of the Department of Natural Resources, and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources; the White Earth Band of Chippewa Indians; and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, the Counties of Mahnomen and Clearwater, Minnesota, and the individual defendants below, Elmer H. Winter, *et. al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 14, 1982.

OPINIONS BELOW

Two memoranda opinions were issued by the District Court. The first, a Memorandum and Order, was filed on May 30, 1980, and is unreported. The second, also entitled a Memorandum and Order, was filed on June 25, 1981, and is reported at 518 F.Supp. 527. The Court of Appeals issued an Opinion on May 14, 1982, which is reported at ____ F.2d ____. The preceding opinions appear in the Appendix in reverse chronological order at 1a through 51a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Judgment of the Court of Appeals was entered on May 14, 1982. By Order dated July 21, 1982, the time for filing this petition for writ of certiorari was extended to September 11, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTE INVOLVED

The relevant statute is the Act of January 14, 1889 (25 Stat. 642), which is reproduced in part in the Appendix at 52a *et seq.*

STATEMENT OF THE CASE

A. Proceedings Below

Underlying the instant petition are two consolidated actions for declaratory and injunctive relief brought in 1974 by the White Earth Band of Chippewa Indians and the United States against the State of Minnesota and various officials of the State of Minnesota's Department of Natural Resources.[1] *White Earth Band of Chippewa Indians* v. *Alexander, et al.*, Civ. No. 3-74-63 and *United States* v. *State of Minnesota*, Civ. No. 3-74-305 (D. Minn.). The focus of these suits is the hunting and fishing rights of the Band and its members within the White Earth Reservation as originally established by the Treaty of March 19, 1867 (16 Stat. 719). In its suit, the Band sought a declaratory judgment that enrolled members of the White Earth Band have the right to hunt and fish within the 1867 Reservation free of State regulation and that the Band has the authority to regulate the hunting and fishing activities of all persons - Indian and non-Indian alike - within that area; it also sought an injunction barring the State from enforcing its hunting and fishing laws within the original reservation. *See* Complaint, Civ. No. 3-74-63. The United States, on the other hand, only sought declaratory and injunctive relief

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1. The Counties of Mahnomen, Becker, and Clearwater, as well as the individual parties — Elmer Winter, *et al.* — subsequently intervened as defendants in Civ. No. 3-74-63.

and injunctive relief in regard to the right of enrolled members of the Band to hunt and fish free of State regulation within the thirty-two townships of the 1867 Reservation considered in *State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980). *See* Amended Complaint, Civ. No. 3-74-305.

By Memorandum and Order dated May 30, 1980 (App. at 47a-51a), the District Court granted the Plaintiff's Motion for Issue Preclusion on the basis of *State* v. *Clark*, *supra*, thereby precluding the Defendants, under the doctrine of collateral estoppel, from relitigating the reservation disestablishment issue as to the thirty-two townships decided in that case.

In May of 1981, the remaining issues were submitted for decision on the basis of a stipulated record, briefs, and oral argument. On June 25, 1981, the District Court issued a Memorandum and Order (App. at 23a-46a) in which it ruled that the remaining four townships of the original White Earth Reservation has been disestablished (App. at 27a-35a), that the Band has only a statutory right to condition entry by non-members for the purpose of hunting and fishing on Indian and tribal trust lands (App. at 35a-40a), and that the State has the authority to continue to regulate hunting and fishing by non-members of the Band on those lands (App. at 40a-45a).

From the Judgment of the District Court, four appeals were taken. The Tribe appealed from those portions of the June 25, 1981 Memorandum and Order

pertaining to the reservation status of the four townships and the authority of the State to regulate hunting and fishing by non-members on Indian trust lands (Appeal No. 81-1861). The Counties, the State and its officials, and the individual defendants cross-appealed from the May 30, 1980 Memorandum and Order (Appeal Nos. 81-1805, 81-1833, and 81-1862). In an Opinion issued on May 14, 1982, the Court of Appeals affirmed the District Court in all respects. App. at 1a-22a.

B. The Factual Background

The White Earth Reservation, as established by the Treaty of March 19, 1867 (16 Stat. 719), consisted of thirty-six townships or approximately 854,740 acres.[2] *See Clark* Stipulation, ¶21.[3] In 1889, title to the lands of this reservation not necessary for allotments, essentially four townships,[4] was ceded by the White Earth Indians to the United States under the Act of January

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2. All of Mahnomen County, eight townships in the southern portion of Clearwater County, and twelve townships in northern Becker county are located within the boundaries of the 1867 Reservation. The individual defendants, Elmer Winter, *et al.*, own land located within the original Reservation.

3. "Clark Stipulation" refers to the facts stipulated to in *State v. Clark* and incorporated into the record in this case.

4. These four townships are in the northeastern portion of the original Reservation and are located in Clearwater County. *See Clark* Stipulation, ¶ 35.

14, 1889, 25 Stat. 642 (App. at 52a-54a) - commonly known as the Nelson Act. *See, e.g.*, H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1890); *Clark* Stipulation ¶¶ 35-37. Virtually all of the remaining thirty-two townships were subsequently allotted pursuant to the requirements of § 3 of the Nelson Act, as amended, to some 5,000 individual Indians.[5] *See, e.g.*, Department of the Interior - Office of Indian Affairs, *General Data Concerning Indian Reservations* at 6 (1929); *Chippewa Indians of Minnesota v. United States*, 90 Ct. Cl. 140, 143 (1940). Of the lands allotted, approximately 645,500 acres eventually passed out of trust status. *Clark* Stipulation, ¶ 38. At present, over seventy percent (70%) of the population within the 1867 Reservation is non-Indian (*compare* ¶ 19 of *Clark* Stipulation *with* ¶ 20), and substantially more than fifty percent (50%) of that area is non-Indian owned.[6] *See Clark* Stipulation, ¶¶ 21-33; App. at 36a. In regard to the four ceded townships, about 2,900 acres of this approximately 92,000 acre area are presently held in trust for the Minnesota Chippewa Tribe. App. at 29a.

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5. No allotments were made in the four ceded townships. *Clark* Stipulation, ¶ 37.

6. At present, the United States holds approximately 54,000 acres in trust for the White Earth Band and approximately 2,000 acres in trust for individual members of the Band within the 1867 Reservation. *Clark* Stipulation, ¶¶ 30 and 31.

Because the focus of the instant case is the right of the White Earth Indians to hunt and fish within their reservation free of State regulation, the extent to which the White Earth Reservation presently exists is necessarily involved. *Compare, e.g., Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 405-06 (1968) *with White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144 n.11 (1980); *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-49 (1973). And, it is because the disestablishment question is involved that the instant case is of particular importance to the State, the Counties, and the non-members of the Band residing in that area. First, it is well established that the State's and Counties' regulatory authority over Band members within their existing reservation, even with the application of Public Law 280 (18 U.S.C. § 1162, 28 U.S.C. § 1360), is significantly limited.[7] Second, whatever

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7. Public Law 280 was automatically extended to all the existing Indian Country in Minnesota, except the present Red Lake Reservation. *See* 18 U.S.C. § 1162; 28 U.S.C. § 1360. Public Law 280, however, does not encompass the taxing or regulatory authority of the state and local governments. *See, e.g., Bryan* v. *Itasca County, Minnesota*, 426 U.S. 373 (1976); *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 661-63 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). Moreover, State regulation of existing hunting and fishing rights is expressly exempted from coverage under Public Law 280. 18 U.S.C. § 1162(b).

inherent regulatory authority a tribal entity may have over non-members necessarily exists only within that entity's present territory - i.e., reservation. *See, e.g., Merrion v. Jicarilla Apache Tribe*, ____ U.S. ____, 102 S.Ct. 894, 901-05 (1982); *White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at 151; *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). In this regard, Indian Tribes have been recognized as having "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands...."[8] *Montana v. United States*, 450 U.S. 544, 565 (1981). And finally, non-Indian activities on-reservation may, in certain circumstances, be exempt from State and local law. *See, e.g., Ramah Navajo School Board v. New Mexico*, ____ U.S. ____, 102 S.Ct. 3394 (1982); *White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at 144; *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

It is also noteworthy that the ultimate interpretation given the Nelson Act in this context will have significance for much of northern Minnesota. This is so

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8. Among other things, this sovereign authority has already been recognized to include the power of taxation. *See, e.g., Merrion v. Jicarilla Apache Tribe, supra*, 102 S.Ct. at 901-09; *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980).

dealt with only a single reservation (*see generally Montana* v. *United States*, *supra*, 450 U.S. at 559 n.8), this Act dealt with all the Chippewa Indian reservations in Minnesota together - twelve reservations in all encompassing some 4,700,000 acres in 1889. *See, e.g.*, App. at 29a, 52a; H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 27 (1890).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT ON AN ISSUE OF IMPORTANCE IN THIS AND ANY OTHER LEGAL CONTEXT WHERE THE GOVERNING PRINCIPLES HAVE NOT REMAINED STATIC.

Underlying the decision of the Court of Appeals to preclude the governmental and individual defendants from relitigating the disestablishment issue considered in *State* v. *Clark*, (App. at 9a-13a) is an unnecessarily narrow and rigid interpretation of the long established change in law exception. The resolution of this issue is not only significant in this context because of the scope of the Nelson Act, but in any other legal context where the controlling principles have been the subject of changing interpretations.

It is a well recognized rule that collateral estoppel "must be used with its limitations in mind so as to avoid injustice...." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). With this general concern in mind, it was established long ago that intervening judicial decisions "may

so change the legal atmosphere as to render the rule of collateral estoppel inapplicable...." *Id.*, 333 U.S. at 600. *Accord, e.g., Montana* v. *United States*, 440 U.S. 147, 161-62 (1979). The primary purpose of this exception is to avoid the inequitable administration of the laws. As pointed out in *Commissioner* v. *Sunnen*,

> [collateral estoppel] is designed to prevent repetitious lawsuits over matters which have been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities....

Id., 333 U.S. at 599. *Accord, Montana* v. *United States*, *supra* at 161 (*quoting* above statement in part). In determining whether there has been a sufficient change in legal atmosphere, the focus in on whether there has been a significant development or modification in the controlling legal principles. *See, e.g., Montana* v. *United States*, *supra*, 440 U.S. at 161-62; *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 599-600. Such a "major doctrinal shift[ ]" (*Montana* v. *United States*, *supra* at 162) has occurred in regard to the Nelson Act subsequent to the decision in *Clark*.[9]

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9. In this regard, it is generally recognized that collateral estoppel "'has never been applied to isues of law with the same rigor as to issues of fact.'" *Western Oil & Gas Association* v. *United States Environmental Protection Agency*, 633 F.2d 803, 809 (9th Cir. 1980), *quoting Segal* v. *AT&T*,

Critical to the decision in *Clark* was the conclusion that the underlying purpose of the Nelson Act - the surplus land act at issue here - was not disestablishment. *Id.*, 282 N.W.2d at 906-07. In reaching this conclusion, the Minnesota Supreme Court relied upon *State v. Forge*, 262 N.W.2d 341, 346 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978) and *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D.Minn. 1971) (Devitt, C.J.),[10] quoting Judge Devitt's opinion in the latter case for that very proposition. *Id.*, 282 N.W.2d at 906-07. That this viewpoint substantially controlled the disposition of the disestablishment issue is readily apparent from the following excerpt from *Clark*:

(cont.)

606 F.2d 842, 845 (9th Cir. 1979). *Accord American Medical International, Inc. v. Secretary of Health, Education and Welfare*, 677 F.2d 118, 123 (D.C. Cir. 1981); *Dorsey v. Solomon*, 435 F. Supp. 725, 742 (D. Md. 1977). *See generally* 1B *Moore's Federal Practice*, ¶ 0.442 [1]. Because congressional intent underlying the surplus land act in dispute is the focal point in disestablishment cases (*see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977)), the issue which the County and individual petitioners seek to relitigate is essentially one of law and, therefore, this general rule is applicable here.

10. These two cases considered the disestablishment effect of the Nelson Act in the context of the original Leech Lake Reservation. Both found that the Nelson Act did not alter the boundaries of that reservation.

> The conclusions reached in *State* v. *Forge*, *supra*, and *Leech Lake Band of Chippewa Indians* v. *Herbst*, *supra*, apply with even greater force to the disestablishment claim raised in this case. By its terms, the Nelson Act provided that the Indians were to move . . . to the White Earth Reservation. If this Act did not terminate the reservation from which the Indians were to be removed then, *a fortiori*, it did not terminate the reservation they moved to....

Id., 282 N.W.2d at 907. In *United States* v. *Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians* v. *State of Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980), Judge Devitt implicitly rejected the interpretation of the Nelson Act espoused in his 1971 *Leech Lake* decision when he expressly stated that the underlying purpose of the Nelson Act was to restore lands to the public domain (*United States* v. *Minnesota*, *supra*, 466 F.Supp. at 1386 n.1, 1387) - language which is, without question, precisely suited to disestablishment. *See*, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U.S. at 589 n.5; *DeCoteau* v. *District County Court*, 420 U.S. 425, 426-27, 446, & 448-49 (1975); *Seymour* v. *Superintendent*, 368 U.S. 351, 355 (1962). After the decision in *Clark*, the Eighth Circuit affirmed *United States* v. *State of Minnesota*, "on the basis of the trial court's well reasoned decision..." thereby adopting the District Court's new interpretation of the Nelson Act as that of the Circuit. *Red Lake Band of Chippewa Indians* v. *State of Minnesota*, 614 F.2d 1161, 1162 (8th Cir.), *cert. denied*, 449 U.S.

905 (1980). Thus, subsequent to the *Clark* decision, the viewpoint regarding the Nelson Act espoused by Judge Devitt in *United States* v. *State of Minnesota*, became the law of the Eighth Circuit. Moreover, the development of this interpretation has continued in the context of the four townships actually considered in the instant cases. In both the opinion of the Eighth Circuit and the District Court, it was recognized that the purpose of the Nelson Act was to assimilate the Indians into non-Indian society "by breaking up the reservation system...." App. at 14a n.5, 29a.

What the preceding discussion demonstrates is that the interpretation of the Nelson Act espoused in *Clark* is plainly at odds with that now prevailing in the Eighth Circuit. The court below, however, ignored this fundamental conflict, finding instead that issue preclusion was appropriate because the *Clark* court had the district court decision in *United States* v. *Minnesota* before it and because it followed the analysis set forth in *Rosebud* and *DeCoteau*. Ultimately though, what this approach results in is the inflexible application of collateral estoppel - an approach uniformly condemned by the courts. *See generally* 1B Moore's *Federal Practice*, ¶¶ 0.405[11] and [12]. It is certainly true that *United States* v. *Minnesota* was before the *Clark* court, but it was only a decision of a district court which had yet to be tested in the appellate courts. It was not until that decision received the imprimatur of the Circuit Court subsequent to the *Clark* decision did the new interpretation begin

to take on the dimensions of a significant doctrinal change.[11] Indeed, the decision whether to consider an untested opinion of a district court as constituting a change in law would require extraordinary prescience. It is more likely then, that a major doctrinal shift occurs when the question involved is passed upon by the appellate courts since a district court decision, standing by itself, is rarely considered to constitute such a change. Furthermore, that the *Clark* court may have employed the proper analytical approach does not remedy the fact that that court took a fundamentally different perspective as to the purpose of the Nelson Act for the very matter at issue - its disestablishment effect - than that subsequently adopted by the Eighth Circuit.

In addition, it is significant that precluding relitigation of *Clark* in this context results in the very evils the change in law exception is intended to avoid - "inequalities in the administration of the ... laws, discriminatory distinctions..., and a fertile basis for litigious confusion...." *Montana* v. *United States*, *supra*, 440 U.S. at 161, *quoting Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 599. This disestablishment issue decided in *Clark* was based upon an interpretation established in the 1971 *Leech Lake* decision. Subsequently, the disestablishment issue decided in *Red Lake Band of Chippewa Indians* and, indeed, the disestablishment of the four

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11. The expanded interpretation of the Nelson Act proffered in this case dramatizes this change.

townships decided in the instant cases, was based upon operative assumptions which conflict with those of *Leech Lake* and *Clark*. There is, moreover, a real threat that further inequitable treatment will result in this context since the Nelson Act dealt with some twelve reservations in all. Because the prevailing interpretation of the Nelson Act in the Eighth Circuit conflicts with that esposued in *Clark* and the decisions upon which it is based, there is plainly "a fertile basis for litigious confusion" over the effect of the Nelson Act in northern Minnesota. Thus, the application of issue preclusion will obviously result in "discriminatory distinctions" and unjust administration of the laws and, therefore, the decision of the lower court sustaining its application should be set aside.

II. THE CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE DOCTRINE OF COLLATERAL ESTOPPEL SHOULD BE APPLIED WHERE THE PURPOSES UNDERLYING ITS USAGE ARE NOT SUBSTANTIALLY SERVED BY ITS APPLICATION - A QUESTION WHICH SHOULD BE, BUT HAS NOT BEEN DIRECTLY ADDRESSED BY THIS COURT.

The Court of Appeals rejected the Petitioners' argument that collateral estoppel should not be applied because the purposes of the doctrine were not substantially served by its application in the instant cases. App. at 12a-13a. The Second Circuit and the Court of Claims have indicated that the doctine of collateral estoppel should not be mechanically applied where the underlying purposes of the doctrine are not thereby served. *La Societe Anonyme des Parfums Le Galion* v. *Jean Patou*,

Inc., 495 F.2d 1265, 1276 (2d Cir. 1974); *Technograph Printed Circuits, Ltd.* v. *United States*, 372 F.2d 969, 976-77 (Ct.Cl. 1967). And, although this Court has not directly addressed the question, it has expressed some concern regarding this problem. *See Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 329-30 (1979). In any event, because particular emphasis is placed on the purposes issue preclusion is intended to serve (*See, e.g., Montana* v. *United States*, *supra*, 440 U.S. at 153-54; *Parklane Hosiery Co., Inc.* v. *Shore*, *supra*, 439 U.S. at 326), and because it is well established that the doctrine should not be applied inflexibly to deny justice, it is only logical that the courts would be reluctant to apply the doctrine where its express purposes are not adequately served by its usage. It is therefore evident that particular care should be taken in the first place in order to ensure that those purposes are in fact substantially served where a claim is made that they are not. In the instant case, the Eighth Circuit failed to do so, opting instead for an overly rigid and formalistic approach, thereby effectively working an injustice on the Petitioners.

The doctrine of collateral estoppel "protects [a litigant's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana* v. *United States*, *supra*, 440 U.S. at 153-54. A careful examination of the circumstances underlying the instant litigation reveals that these concerns are not substantially served

by estopping the Petitioners from relitigating the effect of the Nelson Act on the thirty-two townships considered in *Clark*.

The concerns of protecting litigants from the burden of multiple lawsuits and promoting judicial economy are both accomplished "by preventing needless litigation...." *Parklane Hosiery Co., Inc.* v. *Shore*, *supra*, 439 U.S. at 326. As the historical circumstances show, however, needless litigation has not been forestalled by application of collateral estoppel here, since the issue the Petitioners seek to relitigate - the status of the thirty-two townships - is essentially the same issue as that respecting the remaining four townships litigated (at the behest of the plaintiff Band) in the instant case.[12] As established by Treaty in 1867, the White Earth Reservation consisted of thirty-six townships. *See discussion*, *supra*, at 4. In 1889, title to the lands of this reservation which were not necessary for allotments, essentially four townships, were ceded by the White Earth Indians pursuant to the Nelson Act. *See id.*. The remaining thirty-two townships were expressly reserved under that Act for the purpose of making allotments. *See id.* at 5. With these thirty-two townships as the focal point, the issue in *Clark* was whether the White Earth Reservation,

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12. As pointed out in *Technograph Printed Circuits, Ltd.*, *supra*, "[i]n each instance the question remains whether the new litigation is truly needless...." *Id.*, 372 F.2d at 977.

as established in 1867, was disestablished by the Nelson Act. *Id.*, 282 N.W.2d at 905. With respect to the status of the four ceded townships, the very same question obtains; that is, the ultimate question whether those four townships were also disestablished by the Nelson Act. Because essentially the same legal issue is presented in both instances, the congressional and other documentation relevant to ascertaining the intent of Congress underlying the Nelson Act, as well as the pertinent historical background (see *generally Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)), must be considered in each instance. It is, therefore, apparent that as a result of the Band's own efforts at litigating the status of the four townships, application of issue preclusion in the instant case is not substantially protecting the litigants from the expense and vexation of having to relitigate an issue already decided.

In rejecting this assessment, the Eighth Circuit emphasized that the four townships were the subject of different provisions of the Nelson Act. App. at 12a. True, the four townships considered in the instant case were the subject of different disposition provisions, but this ignores what must actually be considered in resolving the disestablishment question here. The fact is that the entire historic White Earth Reservation was the subject of and was, in fact, dealt with by the Nelson Act. *See also DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) (the status of the entire historic reservation - both allotted and ceded lands - considered as a unified

whole). Thus, regardless of whether the status of the entire 1867 Reservation or just the four ceded townships is under consideration, the same legislative documentation and the same administrative materials interpretive of the Act must be consulted. *See also id.* Moreover, because virtually all the post-Nelson Act documentation deals with Indian activities within the area of the original reservation and with what was considered to be the present reservation, that documentation is equally relevant in either situation. What is apparent then, is that since essentially the same documentation must be considered whether the four ceded townships alone or the entire thirty-six townships are at issue, substantial overlap exists between the two issues. Thus, if, as the Eighth Circuit concluded, application of collateral estoppel in this case actually avoided needless litigation, what was avoided was incidental at best.

Nor has the application of the doctrine truly served the purpose of fostering reliance on judicial action since the possibility of inconsistent decisions has not actually been minimized. This is the product of the conflict which now exists in the case law respecting the underlying purpose of the Nelson Act. As discussed earlier, there is no question that the interpretation of the Nelson Act espoused in *State* v. *Clark* and the cases upon which it is based - *State* v. *Forge*, *supra* and *Leech Lake Band of Chippewa Indians* v. *Herbst*, *supra*, directly conflicts with that subsequently adopted by the Eighth Circuit in *Red Lake Band* and more fully expanded in the instant

case. The result of this conflict is that one approach governs the thirty-two townships of the original White Earth Reservation and the historic Leech Lake Reservation considered in *Forge* and *Leech Lake Band*, while an entirely different approach governs the original Red Lake Reservation and the four townships of the original White Earth Reservation considered in the instant case. And, this inconsistency is of no little moment since, as noted above, the Nelson Act dealt with twelve separate reservations.

The Eighth Circuit disagreed with this assessment stating that "[d]iffering conclusions on the issue of disestablishment of particular reservations may result from different fact situations rather than differing interpretations of the law...." App. at 12a. As with other aspects of its reasoning in this context, this analysis ignores the realities of the reservation disestablishment question. It is certainly true that subsequent variations in legislative or administrative treatment can alter the effect the Nelson Act was intended to have on the reservation areas affected by the Act. Nonetheless, at the outset analysis must focus upon the congressional intent underlying that Act. *See, e.g., Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U.S. at 586; *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 444. It is in this respect that precluding relitigation will not minimize inconsistent decision-making since a conflict already exists in the present case law regarding the underlying purpose of the Nelson Act.

To be considered with this is the fact that the public interests - a matter entitled to consideration in this context (*see, e.g., Porter & Dietsch, Inc. v. FTC*, 605 F. 2d 294, 300 (7th Cir. 1979)) - favors relitigation. The issues involved here are of great importance jurisdictionally to not only the governmental entities involved but to those persons - Indian and non-Indian alike - who reside within or visit the area encompassed by the original White Earth Reservation. *See* discussion, *supra* at 6-7. And, as the previous discussion establishes, uncertainty as to the scope and effect of the Nelson Act, due in large part to *Clark*, persists. In fact, because of the conflict which now exists in the case law respecting that Act, and because eleven other historic reservation areas were affected by the Act, this dispute is likely to recur until the issue is reconsidered under the new perspective espoused in the more recent case law. It is, therefore, apparent that a definitive resolution of the effect the Nelson Act had on the 1867 White Earth Reservation under the perspective now espoused by the Eighth Circuit - is needed to settle this matter once and for all. In conclusion then, not only are the purposes of the doctrine not substantially served by its application in the instant case, but the public interest also favors relitigation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated this 10th day of September, 1982.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 81-1862

White Earth Band of Chippewa Indians,

Appellee,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Counties of Mahnomen, Clearwater and Becker,

Appellants

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer, Ed Grahame,

United States of America,

Appellee

v.

State of Minnesota

No. 81-1833

White Earth Band of Chippewa Indians,

Appellee,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Counties of Mahnomen, Clearwater and Becker,

Appellants

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer, Ed Grahame,

United States of America,

Appellee

v.

State of Minnesota

No. 81-1861

White Earth Band of Chippewa Indians,

Appellant,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Appellees,

Counties of Mahnomen, Clearwater and Becker,

Appellees,

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer,

Appellees,

Ed Grahame,

United States of America,

v.

State of Minnesota,

No. 81-1862

White Earth Band of Chippewa Indians,

Appellee,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Counties of Mahnomen, Clearwater and Becker,

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer,

Appellants,

Ed Grahame

Submitted: January 13, 1982

Filed: May 14, 1982

Before HENLEY, Circuit Judge, GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

McMILLIAN, Circuit Judge.

This case presents appeals and cross-appeals from the district court's[1] granting of motions for issue preclusion and determination of the litigation on the merits. For partial reversal, the White Earth Band of Chippewa Indians argues that the district court erred in (1) ruling that four townships[2] had not been restored to the White Earth Reservation and (2) determining that the State of Minnesota could require "non-members"[3] hunting and fishing on Indian Lands with tribal permission to follow state limits and regulations. The state appellees, intervening counties and individual intervenors cross-appeal from the district court's order which precluded litigation of the disestablishment issue decided in State v. Clark, 282 N.W.2d 902 (Minn. 1979) (Clark), cert. denied, 445 U.S. 904 (1980). They argue that collateral estoppel is inapplicable because (1) there has been a significant change in the law and (2) the purposes of collateral estoppel are not met. For the reasons

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1. The Honorable Edward J. Devitt, United States Senior District Judge for the District of Minnesota.

2. Townships 146, 145, 144 and 143 North of Range 37 West.

3. "Non-member" is used instead of "non-Indian" because Indians who are not members of the Band are treated as non-Indians with regard to hunting, fishing, and wild rice gathering on the Reservation. See Washington v. Confederated Tribes of Colville, 447 U.S. 134, 161 (1980), rehearing denied, 101 S.Ct. 25 (1980).

discussed below, we affirm the judgment of the district court.

The facts underlying this appeal are not disputed. The district court thoroughly discussed the background of litigation, White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527 (D. Minn. 1981); therefore, only facts pertinent to this appeal will be reproduced here.

The White Earth Band is one of six Chippewa Bands comprising the Minnesota Chippewa Tribe. The White Earth Reservation was established by the treaty of March 19, 1867, and consisted of thirty-six townships. 16 Stat. 719, II Kappler 974 (ratified April 8, 1867). In 1889, Congress enacted the Nelson Act, 24 Stat. 642, I Kappler 301, one of a series of particularized allotment acts adopted after passage of the Dawes Act or General Allotment Act of 1887, 24 Stat. 388, I Kappler 33. On July 20, 1889, pursuant to the Nelson Act, the Band ceded their right and title to four northeastern townships. See note 2 supra. Following the Indian Reorganization Act of 1934, 48 Stat. 987, codified at 25 U.S.C. § 476, approximately 2,900 acres of the 92,000 acres of the four ceded townships were restored to trust status.

In 1974, the Band filed a complaint in federal district court against the State of Minnesota and certain state officials seeking declaratory and injunctive relief after numerous arrests of Band members for fishing and hunting violations within the White Earth Reservation. Three Minnesota counties, Becker, Clearwater and

Mahnomen (counties) and four individuals were allowed to intervene. The Band sought a declaration that (1) its members and Minnesota Chippewa Tribe members were entitled to hunt, fish, trap and gather wild rice without any interference, regulation, control or licensing by officials of the Minnesota Department of Natural Resources, and (2) the Band and Tribe had jurisdiction to regulate those activities by non-members within their Reservation. The district court consolidated the action with a suit filed by the United States against the State of Minnesota seeking to prohibit the state from enforcing its hunting, fishing, trapping and wild rice gathering laws (hereinafter gaming laws) against Band members on the Reservation.

The Band's action was held in abeyance by agreement of the parties and with court approval while several issues were litigated in state court regarding prosecutions of Band members for gaming laws violations on the Reservation. These prosecutions were consolidated on appeal before the Minnesota Supreme Court in Clark, 282 N.W.2d 902. The issue in Clark was whether the state had jurisdiction to enforce its gaming laws against Band members on non-Indian owned land within the thirty-two non-ceded townships within the Reservation. The court held (1) the Nelson Act did not disestablish the Reservation and therefore the state's jurisdiction was limited by 18 U.S.C. § 1162(b), Clark, 282 N.W.2d at 908; (2) the Indians have original rights to hunt and fish that were extinguished by the Treaty of February 22,

1855, 10 Stat. 1165, II Kappler 685, but were reacquired in the Treaty of 1867 and never thereafter extinguished, 282 N.W.2d at 908; and (3) the state lacks jurisdiction over Band members' hunting and fishing on the thirty-two townships within the Reservation, id. at 909.

Following the state court's decision in Clark, the district court granted the Band's motion to preclude further litigation of the disestablishment issue as it affected the thirty-two townships and issued a permanent injunction prohibiting the state from enforcing its gaming laws against Band members within the thirty-two townships. The state appellees, intervening counties, and individual intervenors[4] (hereinafter counties) challenge the preclusion order, arguing that a significant legal change renders collateral estoppel inapplicable and the purposes of collateral estoppel have not been met.

The district court also made the following findings: (1) the original thirty-six township Reservation has been diminished by cession of the four northeastern townships, White Earth Band v. Minnesota, 518 F.Supp. 534, citing United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980); (2) the Band may prohibit or condition entry onto Indian-owned or trust

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4. The State of Minnesota joined the appeal only to preserve its position from res judicata if the counties' position is adopted.

land within the Reservation by issuing permits or charging permit fees, but may not proceed against non-members in tribal courts, White Earth Band v. Minnesota, 518 F. Supp. at 535; and (3) the state could enforce its gaming laws against non-members on Indian-owned and trust lands, id. at 538. On appeal the Band challenges the first and third findings. The Band argues that the district court erred in holding that the four northeastern townships are not part of the Reservation because (1) authority to restore the four townships to reservation status is contained in the Indian Reorganization Act; (2) this case is distinguishable from United States v. Minnesota, 466 F. Supp. 1382; and (3) "checkerboard jurisdiction" is impractical and contrary to Congress' intent. The Band also argues that the district court erred in determining the state's authority to require licenses of non-members hunting on Indian land because the issue is not ripe for consideration.

I. Issue Preclusion

The collateral estoppel doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979), citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-329 (1971).

In the present case the parties agree that the technical requirements of collateral estoppel are satisfied

pursuant to the four-part analysis of Oldham v. Pritchett, 599 F.2d 274 (8th Cir. 1979). According to the Oldham court, collateral estoppel is appropriate where:

> (1) the issue . . . [is] . . . identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privy with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. at 279.

However, the counties claim that application of the doctrine of collateral estoppel would be both unjust and against the underlying public interest. The Supreme Court has granted trial courts broad discretion in determining whether offensive collateral estoppel should be applied. Parklane Hosiery Co. v. Shore, 439 U.S. at 331.

The counties first argue that the disestablishment issue is a legal issue and that there has been a significant change in the law so as to render the rule of collateral estoppel inapplicable, citing Commissioner v. Sunnen, 333 U.S. 591, 600 (1948). In support the counties assert that the Clark court relied upon Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971), to find that the underlying purpose of the Nelson Act was not disestablishment, but that after DeCoteau v. District County Court, 420 U.S. 425, 444 (1975) (DeCoteau) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (Rosebud), the same district court found that the purpose

of the Nelson Act was restoration of lands to the public domain. United States v. Minnesota, 446 F. Supp. 1382. The counties argue that because restoration of Indian reservation lands to the public domain is synonymous with disestablishment, see, e.g., Rosebud, 430 U.S. at 588-89 nn. 4 & 5, DeCoteau, 420 U.S. at 426-27, 446, 448-49, the interpretation of the Nelson Act affirmed in Red Lake Band directly conflicts with the major premise of Clark. This, they argue, is a significant legal change rendering collateral estoppel inapplicable.

We disagree. Assuming arguendo that the disestablishment issue is a question of law, the "legal change" exception to collateral estoppel is not available here because the court in Clark had DeCoteau, Rosebud, and United States v. Minnesota before it when it found that the Nelson Act had not disestablished the thirty-two townships. The Clark court applied the correct standard to resolve the disestablishment issue. Citing Rosebud and DeCoteau, the Clark court stated "the standard to be applied in resolving the disestablishment issue is whether a clear congressional intent to terminate the reservation is discernible either from the fact of the act, the surrounding circumstances, or the act's legislative history." 282 N.W.2d at 907. The court in Clark correctly found that Rosebud and DeCoteau were consistent with Leech Lake insofar as the standard used in resolving disestablishment issue. Therefore, the "legal change" exception to collateral estoppel is not applicable.

The counties next argue that the collateral estoppel bar should not be applied because the purposes of the doctrine are not met in this case. The counties argue that the court must now decide the disestablishment issue of the four ceded townships which is essentially the same issue that was decided in Clark because in both the court must rely on the Nelson Act and the same legislative and administrative interpretations of that Act. We disagree. Although the Nelson Act is relevant to both inquiries, the four townships are subject to different provisions of the Act, see I Kappler at 301, H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 37 (1890), because no allotments of land to Indians were made in the four townships, White Earth Band v. Alexander, 518 F. Supp. at 533. Therefore, further inquiry into the status of the thirty-two township area would result in needless litigation. See Parklane Hosiery Co. v. Shore, 439 U.S. at 326.

The counties also claim that application of the collateral estoppel bar in the present case will result in inconsistent decisions because of the conflict in law underlying the interpretation of the Nelson Act. We disagree. Differing conclusions on the issue of disestablishment of particular reservations may result from different fact situations rather then differing interpretations of the law. Indian law is in a state of flux; however, reopening litigation of this particular disestablishment issue would not minimize the possibility of differing adjudications on disestablishment issues. The

Nelson Act treated various bands or tribes and reservations differently, Nelson Act, §§ 1, 3, I Kappler 301-03, 25 Stat. 642, 643, and contemplated that a separate agreement would be negotiated with individual bands or tribes pursuant to the Act. See I Kappler 301. When a court has determined disestablishment of a given reservation in its particular historical and factual setting, prevention of inconsistent adjudication becomes desirable insofar as it fosters reliance on judicial decision making.

We conclude that the district court did not abuse its discretion in finding that the counties had a full and fair opportunity to litigate their claims in Clark and are collaterally estopped from relitigating the question of disestablishment.

II. Reservation Status of the Four Northeastern Townships

Gaming rights are tied to the status of the four townships. If the four townships were ceded and never returned to reservation status, no Indian hunting and fishing rights exist within the four townships. In construing statutes which purportedly terminate the reservation status of any part of a reservation, the congressional intent to do so must be clear on the face of the statute, surrounding circumstances or legislative history, and doubtful expressions must be resolved in favor of the Indians. Rosebud, 430 U.S. at 586-87; DeCoteau, 420 U.S. at 444.

The four northeastern townships of the original Reservation were ceded to the United States by an

agreement executed July 20, 1889, between the Band and the United States pursuant to the Nelson Act.[5] Approximately 2,900 of the ceded 92,000 acres in the four townships were returned to trust status after the enactment of the Indian Reorganization Act. On appeal the Band argues that the entire acreage of the four townships was restored to reservation status because the Nelson Act was never carried out to completion;[6] therefore, subsequent history should be considered in determining the status of the land. The Band claims the Indian Reorganization Act was an attempt to rectify the mistakes of the Nelson Act and restore self-government to the Indians. The Band suggests that the authority to restore the four townships is contained in

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5. Pursuant to the Nelson Act, a Commission was appointed by the United States to negotiate with the Minnesota Chippewa Bands for cession of certain lands. The purpose of the Act was to assimilate Indians into non-Indian society by breaking up the reservation system. See H.R. Rep. No. 789, 50th Cong., 1st Sess. 6 (1888). The agreement provided the Band did "grant, cede, relinquish and convey to the United States all . . . [their] . . . right, title, interest in and to all and so much of said . . . Reservation as is not embraced in the following described boundaries . . ." (following is a description of the 32 townships excluding the northeastern four townships) H.R. Exec. Doc. No. 247, supra, at 37.

6. The Act was to effect a gradual transition from tribal relations to full emancipation. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 211 (1930). This purpose has never been accomplished.

the Indian Reorganization Act. However, the Band cites no authority for the theory that the Reorganization Act impliedly restored land to reservation status and nothing in the Act supports its argument. The Band's interpretation of the Act would have immense nationwide consequence by creating new reservations out of lands long ceded. We reject that interpretation and conclude that if Congress had intended such a result it would have been explicit.

We also reject the Band's argument that the district court's holding will create an impractical checkerboard pattern of conflicting state and tribal jurisdiction within the Reservation which the Supreme Court stated was contrary to congressional intent in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). In Moe the Supreme Court interpreted Section 6 of the General Allotment Act, 24 Stat. 390, as amended 25 U.S.C. § 349, which provides that upon expiration of the trust patent period on allotted lands and the issuance of a patent in fee to an Indian, that land would become subject to state law. The Court in Moe held that the issuance of a fee patent under section 6 did not automatically take that piece of allotted land out of a currently existing reservation. 425 U.S. at 478. In contrast, the present case involves section 5 of the General Allotment Act which allows for the issuance of trust patents and for the cession of lands not allotted or needed for allotment upon terms agreed to by Congress. We conclude that Moe and its discussion of

checkerboard jurisdiction is not relevant to cession agreements which were intended to diminish reservations. Furthermore, checkerboard jurisdiction is not automatically contrary to congressional intent, see, e.g., Title 18 U.S.C. § 1151(b) (1976), which defines "Indian country" as "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state." Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) (state has jurisdiction over Wagner, South Dakota even though it is located within the original Yankton Sioux Indian Reservation because it is not a dependent Indian community).

The district court found that United States v. Minnesota, 466 F.Supp. 1382, controlled the disposition of this issue. In United States v. Minnesota, the district court had earlier considered whether the Red Lake Band of Minnesota Chippewa Indians had relinquished their right, title and interest in lands ceded to the United States. That court examined the Nelson Act, its legislative history, the negotiations and relevant agreements in finding that all property rights in ceded lands had been terminated. The agreement signed by the Band in the present cases contains language identical

to that in the Red Lake Agreement.[7] The district court in the present case found that the legislative history, surrounding circumstances and subsequent history indicate the Reservation was diminished by the four northeastern townships.

On appeal the Band attempts to distinguish United States v. Minnesota on the basis that the Red Lake Reservation contained aboriginal lands while the White Earth Reservation was created by treaty and contained ceded lands. The Band does not indicate what legal difference that should make as far as the cession agreements are concerned and we conclude that there is none for purposes of this case.

The district court carefully analyzed the Nelson Act, its legislative history, subsequent history, negotiation transcripts, and the cession agreement and found that Congress and the Band intended to disestablish the four northeastern townships and that the Indian Reorganization Act restored only 2,900 acres to the reservation. We affirm based on our conclusion that there is no support for the Band's theory that the

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7. The agreement provided the Red Lake Band did "grant, cede, relinquish, and convey to the United States all . . . [their] . . . right, title, and interest in and to all and so much of said . . . Reservation as is not embraced in the following described boundaries . . ." H.R. Exec. Doc. No. 247, supra, at 28; United States v. Minnesota, 466 F. Supp. at 1385.

Reorganization Act impliedly restored the entire four townships to reservation status.

III. Tribal Sovereignty

The district court, relying on the test enunciated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (Bracker), found that state regulation over non-members on trust lands located within the Reservation had not been preempted by federal law and did not impinge upon the Band's right of self government. Therefore, non-members hunting or fishing on trust lands within the Reservation are subject to licensing regulation by both the Band and the state.[8] On appeal the Band concedes that Bracker is the correct standard but argues that the district court erred in reaching the dual regulation on trust lands issue because it was not ripe. In support the Band asserts that the record was incomplete, that federal preemption on trust lands was not an issue in the case, the United States has not yet taken a position on the issue of federal preemption, and there was no examination of the Band's or the United States' activities with regard to wildlife resources on tribal lands. The Band requests this court to vacate the district court's judgment with respect to this issue so

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8. The Band has a 6-1/2 week deer season, the state's deer season is nine days long. The Band permits 150 antlerless deer to be killed, the state permits no killing of such deer. The Band also has longer seasons for hunting small game and trapping fur-bearing animals.

that it can develop a conservation program which it claims would be a relevant factor in a subsequent Bracker inquiry. In response the state argues that the issue was ripe noting that it had been placed before the court by the Band. We agree.

In its complaint the Band sought a declaration that it could enforce its regulations against anyone within the boundaries of the Reservation and that the state could not enforce state gaming laws against anyone anywhere, including on trust land, within the boundaries of the Reservation. The Band thereby presented the issue in its complaint and addressed the merits of state regulatory authority before the district court. As noted by the district court,

> We reject the Band's argument that we should decline to decide the narrower issues presented here pertaining to Indian owned and trust lands, and should await a more clearly defined controversy. This litigation is now seven years old; the interested parties are before the court; and both the Band and the State defendants have expressed a policy and intent to exercise regulatory authority over non-Indian hunting, fishing and wild rice gathering on Indian-owned and trust lands. The issues are squarely before this court; it is appropriate to render a decision.

White Earth Band v. Alexander, 518 F. Supp. at 534 n.4. We conclude that the district court properly reached this issue.

To determine state authority over non-member activities within the Reservation requires a particularized

inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Bracker, 448 U.S. at 145. The state has a strong legitimate interest in regulation of hunting and fishing because of its investment in and historic management of reservation game and fish resources. The Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty. The Band argues that the district court overvalued the state's interest and ignored signficant interests of the Band.

The district court applied Bracker's two-prong test to determine state authority: (1) whether the exercise of state authority has been preempted by federal law, and (2) whether the exercise of state authority unlawfully infringes on the Band's right to make its own laws and be ruled by them. Id. at 142. Considering the first prong, the district court appears to hold that the lack of direct evidence of a federal intent to preempt is fatal to the Band's argument. The Supreme Court, however, has rejected the notion that "an express Congressional statement" is necessary to find federal preemption. Id. at 144, citing Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). The district court found that the Band's inherent sovereignty is "only" a backdrop in determining whether there has been federal preemption, citing Bracker. The Supreme Court, however, stated that tribal sovereignty is an "important

'backdrop,' against which vague or ambiguous federal enactments must always be measured." Bracker, 448 U.S. at 143 (citations omitted and emphasis added).

Under the second prong of the Bracker test, the district court found the Band would suffer no economic hardship from a dual license requirement because non-members would probably obtain both permits so as to be protected from the possibility of inadvertently hunting or fishing on Indian-owned or trust lands without the required permit. The district court also found that state jurisdiction over non-members in the reservation did not infringe on the right of the Band to make their own laws and be governed by them, citing Montana v. United States, 450 U.S. 544 (1981).

Although we think that the district court could have delved deeper into the interrelationship of the various state, federal, and tribal economic, conservation, revenue, and governmental policy interests, see White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981), and would ordinarily be inclined to remand this issue for consideration of the "relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence," Bracker, 448 U.S. at 144-45, we conclude that a remand would serve no useful function here because the Band has not met its burden of showing that the state's gaming laws were unreasonable and unrelated to its regulatory authority. See Washington v.

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160 (1980).[9] Accordingly, we affirm the district court's judgment.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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9. It should be noted that Congress could choose to preempt state authority, but there is no indication of an imminent federal enactment regarding preemption.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

White Earth Band of Chippewa Indians,

Plaintiff,

vs. Civ. 3-74-63

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota, and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Defendants,

and

MEMORANDUM & ORDER

Counties of Mahnomen, Clearwater, and Becker,

Intervenor-Defendants,

and

Elmer H. Winter, Kenneth Albertson, Joe Klinkbomme, Ed Grahame,

Intervenor-Defendants,

United States of America,

Plaintiff,

vs. Civ. 3-74-305

State of Minnesota,

Defendant.

Kent P. Tupper and Peterson, Tupper & Smith, Walker, Minnesota, and Bernard P. Becker, St. Paul, Minnesota, attorneys for plaintiff White Earth Band of Chippewa Indians.

Thomas K. Berg, United States Attorney, Francis X. Hermann, Assistant United States Attorney, Minneapolis, Minnesota, John Jacobsen, Field Solicitor's Office, Washington, D.C., attorneys for United States of America.

Warren Spannaus, Attorney General of State of Minnesota, James M. Schoessler, Special Assistant Attorney General, St. Paul, Minnesota, attorneys for State of Minnesota and Minnesota Department of Natural Resources.

Alfred Schmidt, Bemidji, Minnesota, attorney for individual intervenor-defendants.

Tom D. Tobin, Winner, South Dakota, and David Albert Mustone, Washington, D.C., Tobin Law offices, attorneys for county intervenor-defendants.

This is an action brought by the White Earth Band of Chippewa Indians seeking declaratory relief to determine the Band's rights to hunt, fish, trap and gather wild rice on the White Earth Reservation without regulation or licensing by the defendants, and whether the Band has jurisdiction to regulate hunting, fishing, trapping, and wild rice gathering within the White Earth Reservation. The Band seeks permanent injunctive relief,

prohibiting defendants from enforcing hunting, fishing, trapping, and wild rice laws of Minnesota within the boundaries of the White Earth Reservation.

The action commenced by the Band was consolidated with a case filed by the United States seeking to prevent the State of Minnesota from enforcing its hunting, fishing, and trapping laws against Band and Chippewa Tribe members on the White Earth reservation. Three Minnesota counties and four individuals were permitted to intervene in the action brought by the Band.

The issues before us have been significantly narrowed during the pendency of this litigation. This action was held in abeyance by agreement of the parties and with the approval of this court while several of the issues were litigated in state court in the context of prosecutions of Indians or state hunting and fishing law violations on the White Earth Reservation. These prosecutions were consolidated on appeal before the Minnesota Supreme Court in State of Minnesota v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 100 S.Ct. 1080 (1980) ("Clark").[1]

In Clark, the issue before the court was whether the state has jurisdiction to enforce its game and fish laws against enrolled members of the White Earth Band on non-Indian owned land within 32 of the 36 townships

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1. By agreement of the parties, the stipulated facts and exhibits from the Clark case are made part of the record herein.

within the White Earth Reservation as established by the Treaty of March 19, 1867, 16 Stat. 719, II Kappler 974 ("Treaty of 1867"). In affirming lower court dismissals of the prosecutions, the Minnesota court held that the White Earth Reservation was not disestablished by the Nelson Act of 1889, 25 Stat. 642, I Kappler 301 ("Nelson Act"), and thus that the state's jurisdiction over Indian hunting and fishing on the reservation was limited by P.L. 280, 18 U.S.C. § 1162(b). Id. at 908. The court further held that the Indians have aboriginal rights to hunt and fish that were extinguished by the Treaty of February 22, 1855, 10 Stat. 1165, II Kappler 685 ("Treaty of 1855"), but were later reacquired in the Treaty of 1867, and were never thereafter extinguished. Id. at 909. The Minnesota court concluded that the state is without jurisdiction over Indian hunting and fishing activities on the White Earth Reservation. Id.

Following the Clark decision, the Band moved to preclude defendants from relitigating the issue of whether the Nelson Act disestablished the White Earth Reservation. The court granted that motion by order dated May 30, 1980. The United States thereafter amended its complaint to seek no greater relief than that accorded by the Clark decision.

A recent decision of the United States Supreme Court has also narrowed significantly the issues before us. The Band has taken the position throughout this litigation that it has jurisdiction to regulate hunting, fishing, trapping, and wild rice gathering by non-members

on all reservation lands, including lands held in fee by non-Indians. In United States v. Montana, 101 S. Ct. 1245 (1981), the Court rejected a similar claim made by the Crow Tribe of Montana with reference to the Crow Reservation, holding that the Indians had no authority to regulate non-Indian hunting and fishing activities on non-Indian lands within the reservation. The parties agree that the Montana case disposes of the same issue as it is presented here.

Several issues remain. They are 1) whether the White Earth Reservation includes the four northeastern townships ceded to the United States in 1889 pursuant to the Nelson Act, and 2) whether the Band has jurisdiction to regulate hunting, fishing, trapping and wild rice gathering by non-members on land owned by or held in trust for the Band or individual Indians, and 3) whether the state has authority to regulate these activities on Indian-owned and trust land.

I. The Reservation Status of the Four Northeastern Townships

The rules of construction applicable to treaties and agreements involving land cessions between Indians and the government require that cession treaties and agreements be interpreted as the Indians understood them, and that doubtful expressions be resolved in favor of the Indians. See, e.g., Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970); Winters v. United States, 207 U.S. 564, 576 (1908). Likewise, in construing statutes that purportedly terminate the reservation status of any

part of an Indian reservation, congressional intent to do so must be clear, and doubtful expressions must be resolved in favor of the Indians. DeCoteau v. District County Court, 420 U.S. 425, 444 (1975) ("DeCoteau"); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977). That congressional intent must " 'be expressed on face of the Act or be clear from the surrounding circumstances and legislative history.' " Id., quoting, Mattz v. Arnett, 412 U.S. 481, 505. This court does not however have a license to remake history where there are clear expressions of tribal and congressional intent. Id. at 447, 449.

The White Earth Band of Chippewa Indians is one of six Chippewa bands comprising the Minnesota Chippewa Tribe. The White Earth Reservation was established by the Treaty of 1867, and consisted of 36 townships of land in a square form, consisting of townships 141 through 146 North, Ranges 37 through 42 West, 5th Principal Meridian. The four northeastern townships[2] of the original reservation were ceded to the United States by an agreement made July 20, 1889 between the White Earth Band and the United States pursuant to the Nelson Act. The agreement provided that the band did "grant, cede, relinquish and convey to the United States all . . . [their] . . . right, title and interest . . " in those townships.

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2. Townships 146, 145, 144 and 143 North of Range

The four northeastern townships are comprised of approximately 92,000 acres. Following the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476, aproximately 2,900 acres of these townships were returned to trust status. Clark Stipulation ¶ 37.

The Nelson Act was designed to accomplish an assimilation of the Indians into non-Indian society by breaking up the reservation system, and allotting lands in severalty to individual Indians. It was intended that unallotted lands would be sold. See H.R. Rep. No. 789, 50th Cong. 1st Sess. 6 (1888). This is consistent with the general policy of Congress at that time to encourage Indians to adopt an agricultural lifestyle, as evidenced by the enactment of the Dawes Act in 1887. See Act of Feb. 8, 1887, c. 119, 24 Stat. 388. The Nelson Act sought to effectuate this end by providing for the

> complete cession and relinquishment . . . of all . . . title and interest in and to all the reservations of . . . [the Chippewa Indians in the State of Minnesota] . . . except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as . . . is not required to make and fill the allotments required by this and existing acts . . .

Cession and relinquishment were to be complete upon approval by the requisite number of Indians belonging to the respective reservations, and upon approval by the President. Id.

(cont.)

37 West.

The Act provided that cession and relinquishment of the reservations was to be negotiated by a commission appointed for that purpose. A three member commission, known as the Rice Commission, after member Henry M. Rice, was appointed in 1889.

The Rice Commission negotiated with both the Red Lake and the White Earth Bands of the Chippewa Indians for cession and relinquishment of certain lands. The Rice Commission was instructed by the Commissioner of Indian Affairs that, in implementing the provisions of the Nelson Act, the Commission was to accomplish the "full cession and relinquishment . . . to all and so much of the . . . White Earth . . . [reservation] . . . as in the judgment of the Commission is not required to make the allotments." Letter from Commissioner of Indian Affairs to Commissioners, May 24, 1889, Clark State Exhibit S-K. Those instructions also required that the Commissioners precisely define for the White Earth Indians the cession of any lands on the White Earth reservation:

> The boundaries of the tracts so reserved by you (the diminished White Earth and Red Lake Reservations) must be definitely determined and fixed and accurately described so that the Indians interested therein may be able to act intelligently and with a thorough knowledge as to just what and how much land they are parting with by cession and relinquishment to the United States, and in order that the deed of acceptance, cession and relinquishment may describe the cession in a manner that cannot be mistaken or misunderstood.

Id. at 11-13.

The transcripts of the negotiations between the Rice Commission and the Indians clearly reflect that the proposed cession of the four townships was fully considered by the Indians, and that it was understood that the reservation would be diminished by cession of those lands. See Transcript of Council at White Earth, July 17-29, 1880, House Exec. Doc. No. 247, 51st Cong. 1st Sess., 85-116 (1890), Clark State Exhibit SL.

In United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), afirmed sub nom, Red Lake Band of Chippewa Indians, 614 F.2d 1161 (8th Cir.) cert. denied, 100 S. Ct. 279 (1980), this court considered whether the Red Lake Band of the Minnesota Chippewa Indians relinquished all their right, title and interest in lands ceded to the United States in 1889 and 1904. An examination of the language of the Nelson Act, its legislative history, the negotiations, and the subsequent construction given to the enactment and relevant agreements compelled a conclusion that all property rights of the Red Lake Indians in the ceded lands had been terminated. There, as here, the express language of the Nelson Act and its legislative history reveal a clear congressional intent to extinguish all property rights in the ceded lands.

Moreover, the negotiations conducted by the Rice Commission with the Red Lake Band in connection with the Red Lake cessions made it clear that no property

rights would survive in the ceded lands. Id. at 1387. The same commissioners subsequently communicated the same message to the White Earth Indians in connection with the cession of the four northeastern townships. That the intent was the same with regard to the four townships is manifested by a statement made by Commissioner Rice to the White Earth Band at the Sixth Council at White Earth on July 24, 1880:

> Now, should your present reservation be reduced: should some townships be taken off, that land will have the same status as the land just ceded at Red Lake. We are distinctly of the opinion that for your own safety and protection you should part with a small portion of this reservation. Power is given us under the act to reduce it if we see fit, but we are not going to exercise any power which would be injurious to you.

H.R. Exec. Doc. No. 247, supra at 96. The agreement ultimately signed by the White Earth Indians contained language identical to that found in the Red Lake agreement. Both agreements recited that the Indians "do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said . . . Reservation as is not embraced in the following described boundaries . . . " Id. at 27, 38; see United States v. Minnesota, 466 F. Supp. at 1385.

The Band argues that the final draft of the Rice Commission Reports as it pertains to the White Earth Reservation does not accurately reflect the negotiations between the Band and the Rice Commission. The Band

offers as evidence early drafts of the proceedings during the councils at Red Lake, Bois Forte, Mille Lacs, Grand Portage, Gull Lake, Fond du Lac, Leech Lake, Cass Lake, White Oak Point, and Winnebagoshish. See Alexander Band Exhibits 16-35. These early drafts were found at the Regional Branch of the National Archives in Kansas City. If an earlier version of the White Earth Council exists, it could not be located.

The Band argues that the unedited earlier drafts contain substantial differences from the final report of the Commission, which were published as H. Exec. Doc. 247, 51st Cong., 1st Sess. (1890). These differences purportedly show that the final report did not accurately reflect the understanding of the Indians of the Nelson Act and the cession of reservation lands. The Band takes the position that these allegedly substantial differences compel a conclusion that the White Earth Indians never intended to cede all their right, title and interest in the four northeastern townships to the United States.

We have examined all early drafts of the Rice Commission Reports introduced by the Band. We do not agree that the differences between the early and final version of the Rice Commission Reports are substantial ones. Nor are we persuaded that any such differences support a conclusion that the White Earth Indians did not intend to unconditionally relinquish their interest in the four northeastern townships. The minor changes in the record of the Red Lake Council, which immediately preceded the White Earth Council, and involved a similar

cession of a portion of the Red Lake Reservation, and the record of the White Earth Council, which reflects a thorough airing of Indian concerns regarding the cession, convince us that the final version of the Rice Commission Report accurately reflects the understanding of the Indians with reference to the cession of the four northeastern townships. See Alexander Band Exhibits 15-17.

Neither does the subsequent construction of the enactments and agreements nor the subsequent treatment of the townships distinguish this case from the Red Lake land cessions. The Band's argument that the agreement ceding the four northeastern townships to the United States was conditional is not supported by the subsequent treatment nor history of those townships. No allotments of land in severalty to Indians were ever made in the four notheastern townships as they were on the other thirty-two townships comprising the Reservation. See Clark Stipulation ¶ 37. Annual Reports of the Department of the Interior indicate that federal government involvement with the four townships on behalf of the Indians was directed to carrying out the terms of the Nelson Act and cession agreement. See, e.g., House Exec. Doc. No. 5, 56th Cong., 2d Sess., LV-LVII (1900), Intervening Counties Exhibit CX-26; House Exec. Doc. No. 5, 58th Cong., 2d Sess., 296-97 (1903), Intervening Counties Exhibit CX-30.

Accordingly, we conclude that the language of the Nelson Act and the agreement ceding the four

northeastern townships to the United States was "precisely suited" to diminish the White Earth Reservation as established by the Treaty of 1867, see DeCoteau, 420 U.S. at 445, and that the legislative history, surrounding circumstances, and subsequent history clearly indicate that the four northeastern townships of the original reservation are no longer part of the White Earth Reservation.

II. Tribal Jurisdiction Over Hunting, Fishing, and Wild Rice Gathering on Indian Trust Lands.

The Band has conceded that the decision of the United States Supreme Court in United States v. Montana, 101 S.Ct. 1245 (1981) (hereinafter "Montana") controls disposition of the issue of Band jurisdiction over non-member hunting, fishing, and wild rice gathering on non-Indian owned fee lands within the reservation. Left for our consideration is the issue of Band authority over these activities by non-members of the Band[3] on lands owned by or held in trust for the Band or its individual members. It is also necessary to determine the nature and extent of state jurisdiction over hunting, fishing and

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3. We use the term "non-member" rather than "non-Indian." Indians who are not members of the Band stand on the same footing as non-Indians with regard to hunting, fishing, and wild rice gathering on the Reservation. See Washington v. Confederated Tribes of Colville, 100 S.Ct. 2069, 2085 (1980); Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724, 726, n.1 (10th Cir. 1980).

wild rice gathering activities of non-members on Indian-owned and trust lands.[4]

It is difficult to specify the exact quantity of land owned by or held in trust by the Band and its members. It is safe to say that it is a small percentage of the total Reservation. See Clark Stipulation ¶¶ 17, 30-32. Currently, of the 709, 500 acres originally held in trust for the Band in the thirty-two townships, 653,500 acres (92 percent) are not in trust status. In the four northeastern townships, no allotments were ever made. Some of the ceded lands in the four northeastern townships have been restored to trust status. A rice reserve has been established on these lands.

State v. Clark, 282 N.W.2d 902 (Minn. 1979), established that the Band has the right to hunt and fish free of state regulation on all reservation lands. These are aboriginal rights relinquished by the Treaty of 1855, but later reacquired by the Treaties of 1864 and 1867. Id. at 908. The Minnesota Court also recognized that

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4. We reject the Band's argument that we should decline to decide the narrower issues presented here pertaining to Indian-owned and trust lands, and should await a more clearly defined controversy. This litigation is now seven years old; the interested parties are before the court; and both the Band and the State defendants have expressed a policy and intent to exercise regulatory authority over non-Indian hunting, fishing, and wild rice gathering on Indian-owned and trust lands. The issues are squarely before this court; it is appropriate to render a decision.

these rights are a basic incident of reservation status. Id. at 909. These same principles apply to the rights of the Indians to gather wild rice. See id. at 909, n. 19; Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724, 729 (10th Cir. 1980); United States v. Finch, 548 F.2d 822, 832 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676 (1977).

It is also true that the Band may condition or prohibit entry by non-members on Indian-owned and trust lands for the purpose of hunting, fishing and rice gathering by requiring compliance with permit requirements, seasons, limits, and rules regarding means of taking game, fish, and rice. This authority of the Band over non-members is grounded upon 18 U.S.C. § 1165,[5] its inherent right to exclude non-members from its lands, see Williams v. Lee, 358 U.S. 217, 219 (1959), and the Band's power to govern itself as granted by its Constitution. See Revised Constitution and Bylaws of

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5. 18 U.S.C. § 1165 provides,
Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping or fishing thereon, or for removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish and peltries in his possession shall be forfeited.

the Minnesota Chippewa Tribe, Alexander Band Exhibit 37; United States v. Montana, 101 S.Ct. at 1254, aff'g in part, 604 F.2d 1162, 1165-66 (9th Cir. 1979); Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410-11 (9th Cir. 1976); People of the State of California v. Quechan Tribe of Indians, 424 F. Supp. 969, 974 (S.D. Cal. 1977), vacated on other grounds, 595 F.2d 1153 (9th Cir. 1979).

In exercising its authority to condition or refuse entry on Indian-owned and trust lands for the purpose of hunting, fishing and gathering, the Band may not assert criminal jurisdiction over non-members who violate conditions of entry on Indian-owned and trust lands. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Band's authority to regulate or prohibit these activities does not extend to application of the Conservation Code of the White Earth Indian Reservation to non-members by arrest of non-member violators, tribal court proceedings against non-members, imposition of fines, or forfeitures. See Clark Defendants' Exhibit 30.

In Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976), the court prescribed the limits of the Tribe's authority in regulating non-member hunting and fishing:

> These are the rights to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal law; to refer those who violate state or federal laws to state or federal

> officials; and to designate officials responsible for effectuating the foregoing.

Id. at 411. Moreover, the court held that forfeiture proceedings were quasi-criminal in nature, and thus the Tribe could not cause any non-member to forfeit property as a consequence of violating tribal law. Id., citing, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

In the Montana case, the Ninth Circuit held that the Crow Tribe had the authority to regulate hunting and fishing on the reservation within constraints of the Quechan decision, 604 F.2d at 1165. Insofar as the holding applied to land owned or held in trust for the Tribe, the Supreme Court readily endorsed it. See United States v. Montana, 101 S. Ct. at 1254.

Accordingly, we hold that, as to Indian-owned and trust lands within the White Earth Reservation, the Band may prohibit or condition entry by issuing and charging a fee for permits, setting limits and seasons, and prescribing permissible means of taking fish and game. We also hold that the Band may not proceed against non-members in tribal court, it may not arrest or search non-members, nor may it impose fines on non-members for violations of the Conservation Code. We hold that the Band's recourse for violations of conditions of entry by non-members is limited to suspension or revocation of permits and licenses, eviction of persons violating the Code from Indian-owned and trust lands and referral of

violators to federal authorities for prosecution under 18 U.S.C. § 1165.

III. State Authority to Enforce State Game and Fish Laws on Indian Owned and Trust Lands.

The Band has instituted a rather extensive conservation program. The Band has four full-time conservation officers, two conservation officer trainees, four conservation officer cadets, one full-time fish biologist, four staff persons to assist the fish biologist and a seven member ricing committee. In addition, the Minnesota Chippewa Tribe employs a water quality expert who is available to the Band, and the Band receives assistance from a Bureau of Indian Affairs Project Supervisor, and technical assistance from the United States Fish and Wildlife Service of the United States Department of the Interior, and the University of Minnesota Water Analysis facilities.

The State of Minnesota has a policy of enforcing Minnesota game and fish laws against non-Indians on all lands within the White Earth Reservation. Clark Stipulation ¶ 43. The State does not, however, claim that it otherwise actively manages wildlife resources on Indian-owned or trust lands.

The issue of state authority over non-member activities on trust lands requires a "particularized inquiry into the nature of State, Federal, and tribal interests at stake, and inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v.

Bracker, 100 S.Ct. 2578, 2584 (1980) (hereinafter "Bracker"). This inquiry is guided by consideration of whether the state exercise of authority has been preempted by federal law, and whether the exercise of state authority may unlawfully infringe on the right of the Band to make its own laws and be ruled by them, Bracker, 100 S.Ct. at 2583. Either of these standards standing alone are sufficient to make state law inapplicable on Indian land. Id. Congressional expressions of intent with regard to self government must be read against the "backdrop" of deeply held traditional notions of Indian self government. Id. quoting, McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 172 (1973).

Indian tribes retain attributes of sovereignity over both their members and their territory. Bracker, 100 S.Ct. at 2583. It is because of the "unique historical origins or [sic] tribal sovereignity" that different principles apply in analyzing the preemption of state law on Indian lands. Id. It is difficult to conceive of a subject matter in which the Indian tribes would have a stronger traditional interest than in hunting, fishing, and food gathering. See United States v. Winans, 198 U.S. 371, 381 (1905). In this instance, it has already been established for the purposes of this litigation that the Band has aboriginal rights, reestablished by treaty to engage in these activities. See Clark, 282 N.W.2d at 909.

There is also a "significant geographical component" of tribal sovereignity which has been deemed

by the Supreme Court to be "highly relevant" to any preemption analysis. Bracker, 100 S.Ct. at 2587. In this case, this factor weighs in favor of the Band, given the Indian ownership or trust status of the lands in question.

The federal government has expressed a policy of encouraging tribal self government and economic development and self sufficiency. See Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476; Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et. seq. In this instance, the Band also receives assistance from both the Bureau of Indian Affairs and the Fish and Wildlife Service of the Department of the Interior in administering its comprehensive program of conservation management and regulation. It is noteworthy, however, that the United States has never taken the position in this lawsuit that state law has been preempted with regard to non-Indian hunting and fishing anywhere within the Reservation. Nor do we find any direct evidence of a federal intent to preempt state hunting and fishing laws in any federal statute or the applicable treaties. Nor is this a case where federal involvement in Indian conservation efforts points to a federal intention to preempt the State from any authority. Compare Bracker, 100 S.Ct. at 2584-85.

We now examine the State's interest in applying its game and fish laws to non-members on Indian-owned and trust lands. While the State has historically been extensively involved in fish and wildlife management and

regulation within the White Earth Reservation, the State does not assert that it provides such services on Indian-owned and trust lands. Given the checkerboard nature of the distribution of trust and Indian-owned lands within the Reservation, and the relatively small amount of Indian-owned and trust lands, the State's interests in uniform wildlife management are not solely limited to those lands on which it has directly exercised this function. The Indian-owned and trust lands, not the subject of Band conservation efforts until relatively recently, have undoubtedly benefited from the State's efforts in this area.

We conclude that the State has a stronger interest in this instance in the regulation of hunting, fishing, and wild rice gathering by non-members on the Indian-owned and trust lands. Although it is clear that the right of the Band to hunt and fish and gather rice is an attribute of their inherent sovereignty, that sovereignty serves only as a backdrop in determining whether federal law has preempted the application of state law in this instance. See Bracker, 100 S.Ct. at 2582. We find no such federal expression of an intent to preempt in this instance.

We must still consider the second prong of the Bracker test: whether the exercise of state authority may unlawfully infringe on the right of the Band to make its own laws and be governed by them. Id. Dual regulatory systems, as opposed to dual systems of taxation, will always be in conflict to some extent. See

Mescalero Apache Tribe v. State of New Mexico, 630 F.2d at 730. The inquiry must focus on whether the conflicts infringe on the Band's right to govern itself.

There are conflicts between the State and Band regulatory schemes.[6] But to the extent that conditions set on hunting, fishing, and rice gathering by non-members are more stringent than those imposed by State law, the provisions of 18 U.S.C. § 1165 mandate that these conditions may be imposed on non-members.

With this qualification, we discern no impingement on the right of the Band to govern its members and its internal relations by a State exercise of authority over non-member hunting and fishing. We are not persuaded that the imposition of a dual license requirement on non-members would result in any economic hardship to the Band because of non-member reluctance to utilize Indian-owned and trust resources. The record does not support any such conclusion. In view of the geographic distribution of Indian-owned and trust lands in this instance, the likelihood is greater that a non-member would purchase a tribal permit to protect himself from

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6. Compare Conservation Code of the White Earth Indian Reservation, Clark Defendants' Exhibit 30 with Minn. Stat. Ch. 97, 98. An example of clear conflict between the two regulatory schemes is the Band's provision that no person shall be required to possess a Minnesota fishing or hunting license while engaging in these activities on the Reservation. See Conservation Code, supra at ¶¶ 22.05, 32.03.

the possibility of inadvertently hunting or fishing on the Indian-owned and trust lands without the required permit. It is also likely that, given the vast resources in Minnesota for hunting and fishing, many non-members choosing to hunt or fish on Indian-owned land would have a Minnesota license in any case. Nor is there any evidence that the enforcement of State fish and game laws against non-members would disrupt the conservation efforts of the Band.

After carefully considering the interests of the federal government, the Band, and the State, we conclude that there is no federal intent to preempt the exercise of State authority over non-member hunting, fishing, and rice gathering on Indian-owned and trust lands, nor will the exercise of State authority infringe on the Band's right of self-government.

Accordingly, we declare that: 1) The White Earth Band of Chippewa Indians is entitled to hunt, fish, and gather wild rice on the White Earth Reservation without interference from or regulation by the State of Minnesota; 2) the White Earth Reservation, as established by the Treaty of 1867, was diminished by the cession of the four northeastern townships of the White Earth Reservation by an agreement between the White Earth Band and the United States dated July 20, 1889; 3) the White Earth Band has the statutory right to condition entry by non-members of the Band for the purposes of hunting, fishing and wild rice gathering on lands owned by the Band and its individual members and lands held

in trust for the Band or its members by the United States. The State of Minnesota is permanently enjoined from enforcing its game and fish laws on the White Earth Reservation against members of the White Earth Band. The Band's request that the State of Minnesota be permanently enjoined from enforcing its game and fish laws against non-members of the Band anywhere within the White Earth Reservation is DENIED.

Dated: June 25, 1981.

EDWARD J. DEVITT, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

White Earth Band of Chippewa Indians,

Plaintiff,

vs. Civ. 3-74-63

Robert L. Herbst, Individually and as Commissioner of Natural Resources for the State of Minnesota, Jerome Liemandt, Chief of Enforcement and Field Services for the Department of Natural Resources, James Goltz, conversation officer for the Department of Natural Resources, individually and as conservation officer, and Dennis Huwe, conservation officer for the Department of Natural Resources, individually and as conservation officer,

Defendants;

(and) MEMORANDUM & ORDER

Counties of Becker, Mahomen and Clearwater,

Intervenors,

(and)

Elmer H. Winter, Kenneth Albertson, Joe Klinkbomme, Ed Grahame,

Also Intervenors.

(and)

United States of America,

Plaintiff,

vs. Civ. 3-74-305

State of Minnesota,

Defendant.

Kent Tupper, Walker, Minnesota, and Bernard Becker, St. Paul, Minnesota, attorneys for White Earth Band of Chippewa Indians.

Thomas K. Berg, United States Attorney, Francis, Hermann, Assistant United States Attorney, Minneapolis, Minnesota, attorneys for United States of America.

Warren Spannaus, Attorney General, James Schoessler, Special Assistant Attorney General, St. Paul, Minnesota, attorneys for State of Minnesota and individual defendants.

Alfred Schmidt, Bemidji, Minnesota, and David Mustone, Washington, D.C., attorneys for intervening defendants.

Plaintiff, the White Earth Band of Chippewa Indians, moves for an order precluding relitigation of the issues decided by the Minnesota Supreme Court in the recent case of State v. Clark, 282 N.W.2d 902 (Minn. 1979). In Clark the Minnesota Supreme Court held that the state was without authority to regulate hunting and fishing activities of Chippewa Indians in 32 Minnesota townships within the White Earth Reservation. When Clark was being litigated the present case, raising the same issues but involving four additional townships, was

pending in this court. The parties agreed to stay this federal action and litigate the issues with respect to the 32 townships in state court in the Clark lawsuit. All the parties to this federal action, including the intervening defendant counties, participated actively in the Clark litigation in state court. All the parties except the intervening counties now agree that Clark is binding on the parties and on this court with respect to the 32 townships involved in Clark.

The principal issue is whether relitigation of the issues involved in Clark is barred by principles of collateral estoppel - issue preclusion. All parties agree that the technical requirements of issue preclusion are satisfied, since all the parties participated in the state action, the issues were fully and fairly litigated, the state court action resulted in a valid and final judgment, and the resolution of the issues was essential to that judgment. See, e.g., Restatement (Second) of Judgments, § 68 (Tent. Draft No. 4, 1977); Parklane Hosiery Co. v. Shore, 99 S.Ct. 645, 649 n.5 (1979). The intervening counties' position is that, although the technical requirements of collateral estoppel are satisfied, this court in its discretion should nonetheless permit relitigation. This position apparently is premised on the argument that there is intervening case law which the Minnesota Supreme Court in Clark did not consider, in particular the United States Supreme Court cases of Rosebud Sioux Tribe v. Kneip, 97 S.Ct. 1361 (1977) and DeCoteau v. District County Court, 95 S.Ct. 1082 (1975),

and this court's decision in United States v. Minnesota, 446 F. Supp. 1382 (D. Minn. 1979). The problem with this argument is that all these cases predate Clark and in fact were considered by the Minnesota Supreme Court when it decided Clark. Therefore, the intervening counties in effect are merely asking this court to review the decision of the Minnesota Supreme Court. That is the task of the United States Supreme Court, not this court. This court is satisfied that the issues with respect to the 32 townships were fully and fairly litigated in Clark and should not be relitigated in this case.

There is a second, independent reason for granting the White Earth Band's motion. This court in effect abstained from deciding the status of the 32 townships, deferring to the state courts. Although this was done pursuant to agreement by the parties, the effect was the same as traditional Pullman-type abstention. See, e.g., Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). Under the Pullman abstention doctrine the parties, if they without reservation submit their federal claims to the state tribunal for resolution, are precluded from relitigating those issues in the federal action, but rather their exclusive federal avenue of relief is by appeal to the Supreme Court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Consequently, under basic abstention

principles the issues decided in Clark cannot be relitigated in this case.[1]

Plaintiff's motion for issue preclusion is GRANTED. The parties also are directed to appear before this court on June 23, 1980, at 9:00 A.M., for a status conference concerning the issues remaining to be resolved.

Dated: May 30, 1980

EDWARD J. DEVITT, Chief Judge
United States District Court

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1. The intervening counties also make the rather interesting request that this court permit them to relitigate the general issue of reservation disestablishment, without reconsidering the more particular question of hunting and fishing rights decided in Clark. The granting of this request, of course, would run directly counter to the command of Art. III of the Constitution, that federal courts decide only cases or controversies, not hypothetical, abstract questions. In this case the controversy alleged in the complaint concerns hunting and fishing rights and the court cannot render an advisory opinion disconnected from that controversy.

ACT OF JANUARY 14, 1889, 25 STAT. 642
(THE NELSON ACT)

CHAP. 24 - An act for the relief and civilization of the Chippewa Indians in the State of Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated: and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect; Provided further, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the

purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

* * *

Sec. 3. That as soon as the census has been taken and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: Provided, however, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled

under this act: Provided further, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

* * *

Approved, January 14, 1889.

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IN THE

Supreme Court of the United States

October Term, 1982

No. 82-437

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA; and ELMER H. WINTER, et al.,
Petitioners,

vs.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA; and JOSEPH N. ALEXANDER, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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The Respondent, White Earth Band of Chippewa Indians, respectfully requests that this Court deny the petition for a writ of certiorari sought by the two intervening counties and the individual intervenors, to review the decision of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

This litigation was commenced in 1974 with the filing of a complaint for declaratory and injunctive relief by the Respondent, White Earth Band of Chippewa Indians, after numerous arrests of Band members for fishing and hunting violations within their Reservation. The Band sought a

declaration that its members and members of the Minnesota Chippewa Tribe were entitled to hunt, fish, trap and gather wild rice without any interference, regulation, control or licensing by the Defendants, officials of the Minnesota Department of Natural Resources, and that the Band and Tribe had jurisdiction to regulate those activities by non-Indians and Indians alike within their Reservation.

Subsequently, the United States filed suit against the State of Minnesota seeking to prohibit the State from enforcing its hunting, fishing, trapping and wild ricing laws against Band and Tribal members within the White Earth Reservation. These cases were consolidated by the District Court on January 20, 1975.

In the fall of 1974 the Minnesota Counties of Clearwater, Mahnomen and Becker were allowed to intervene as parties Defendant as was a separate group of individual residents of the Reservation area.

The federal court action was held in abeyance by agreement of the parties and with the approval of Judge Devitt, pursuant to specific requests of the two petitioner counties, the State and Becker County contained in their Answers, and oral requests to the Court in order to allow the State courts to hear certain issues in the litigation. During that period the issue of the disestablishment of the White Earth Reservation was litigated through the State court system. The result of that litigation was *State of Minnesota v. Clark*, 292 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980), holding that the White Earth Reservation was not disestablished by the Nelson Act of 1889, 25 Stat. 642, and therefore, the State had no jurisdiction over hunting, fishing and gathering activities of Chippewa Tribe members within 32 townships of the original 36 township

1867 Reservation. Specifically unresolved by *Clark* was the status of four northeastern townships of the original 36 township Reservation which were the subject of a cession agreement between the Band and the United States and in which no allotments were made.

In February, 1980, subsequent to the denial of certiorari in *Clark* by the United States Supreme Court, Respondent moved to preclude relitigation of the disestablishment issue as it affected the 32 township Reservation. Judge Devitt granted that motion on May 30, 1980.

The case was argued before Judge Devitt on May 13, 1981. Judgment was entered on June 25, 1981 declaring that (1) the White Earth Band is entitled to hunt, fish and gather wild rice free from State licensing or regulation on the White Earth Reservation; (2) the White Earth Reservation was diminished by the cession of four northeastern townships; (3) the White Earth Band has a statutory right to condition entry on Indian lands by non-members for hunting, fishing or wild rice gathering.

An injunction was issued permanently enjoining the State of Minnesota from enforcing its game and fish laws on the White Earth Reservation against members of the White Earth Band.

On July 27, 1981 the intervening Counties filed a timely Notice of Appeal from the preclusion Order of the District Court dated May 30, 1980 as did the individual Intervenors on August 10, 1981. The State Defendants appealed the May 30, 1980 Order on August 4, 1981 in order to preserve their rights from any *res judicata* effect. The Respondent Band cross-appealed on August 10, 1981 from so much of the District Court's Judgment as diminished their Reservation by four townships and determined that

Minnesota has authority to regulate non-member hunting, fishing, trapping and wild rice activities on Indian trust or allotted lands.

The Court of Appeals affirmed the judgment of the District Court in all respects. It held that there had been no abuse of discretion "in finding that the counties had a full and fair opportunity to litigate their claims in *Clark* and are collaterally estopped from relitigating the question of disestablishment." (Pet. App. 13a)

REASONS FOR DENYING THE WRIT

1. There is no conflict between the decision of the Eighth Circuit and decisions of this Court.

The Petitioners argue that the decision of the Eighth Circuit conflicts with decisions of this Court dealing with collateral estoppel.

The Petitioners conceded in the District Court and the Court of Appeals that all the elements of collateral estoppel were present in this case. (Pet. App. 9a-9b). They sought discretionary relief from the application of the collateral estoppel doctrine based upon an asserted change in law. The Court of Appeals held that even if disestablishment is a question of law only, there was no change in law. The Court of Appeals was clearly correct.

State v. Clark, 282 N.W.2d 902 (Minn. 1979), *cert. denied* 445 U.S. 904 (1980) is the decision which forms the basis of the estoppel. That case was decided in 1979 and *certiorari* was denied by this Court in 1980. The Petitioners argue that the "change of law" occurred when the District Court and the Eighth Circuit decided *United States v. Minnesota*, 466 F.Supp. 1382 (D. Minn. 1979), aff'd sub.

nom. *Red Lake Band of Chippewa Indians v. State of Minnesota,* 614 F.2d 1161 (8th Cir.), *cert. denied* 449 U.S. 905 (1980), and found Congress had an intent in the Nelson Act, 25 Stat. 642, to diminish some parts of the Red Lake Chippewa reservation in Minnesota. This intent, argue the Petitioners, now makes *Clark* wrong and an instrument of injustice to the counties whose boundaries include the White Earth Indian Reservation.

Both Judge Devitt, who decided *United States v. Minnesota, supra* (Red Lake case) and the Court of Appeals which affirmed his decision have concluded that there has been no change in law as a result of their Red Lake decisions and, therefore, no reason to exercise discretion to relieve the counties of the preclusive effect of *State v. Clark, supra,* on the 32 township White Earth reservation disestablishment issue.

Nowhere is there any conflict with a decision of this Court. Both *Commissioner v. Sunnen,* 333 U.S. 591 (1948) and *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) were followed by the Court of Appeals and the District Court. Those Courts merely declined to accept Petitioners' evaluation that between 1979 and 1981 there had been a sufficient change in law to warrant application of the discretionary rule. Since both of those courts were construing their own decisions, there is no conflict with any decisions of this Court. What the petitioners seek is another opportunity to argue that the Minnesota Supreme Court was wrong in *State v. Clark.* It is protection against just such an imposition on a litigants' and the judicial system's resources that is one of the purposes of collateral estoppel. *Montana v. United States,* 440 U.S. 147 (1979).

2. This case raises only issues of a possible abuse of discretion and turns on facts peculiar to this litigation.

The Petitioners and their co-parties below specifically requested the federal court to defer a decision on the reservation disestablishment question to the state courts. (Pet. App. 7a). That decision went against them in both the state trial court and the Minnesota Supreme Court, *State v. Clark, supra.* Certiorari was denied by this Court. They sought, in the federal court, an opportunity to relitigate that question. The issue presented by the Petitioners in their certiorari petition is whether the Eighth Circuit has read the "change in law" exception to the collateral estoppel doctrine too "rigidly." These Petitioners are not the appropriate parties to raise that general question since they specifically sought deferral of the federal court action in order to pursue the disestablishment issue in the state courts. Even if this Court should deal with the scope of the change in law exception in some future case, this case does not properly present that issue. These Petitioners specifically sought to have the underlying issue determined in the state courts for some perceived advantage. They should be bound by that choice.

A decision from this Court on the scope of the change in law exception, rendered in a case in which the very courts which are said to have created the change, yet which have found no change, would not provide much direction to the lower courts. Such a decision could only deal with the peculiarities of this particular litigation.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 82-437 and 82-635

In the Supreme Court of the United States

OCTOBER TERM, 1982

COUNTIES OF MAHNOMEN AND CLEARWATER, MINNESOTA, ET AL., PETITIONERS

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS, ET AL.

JOSEPH N. ALEXANDER, ET AL., PETITIONERS

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly held that petitioners are precluded from relitigating the reservation disestablishment issue decided by the Minnesota Supreme Court in *State of Minnesota* v. *Clark*, 282 N.W.2d 902 (1979) (en banc), cert. denied, 445 U.S. 904 (1980), as it affects the status of the White Earth Indian Reservation.

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In the Supreme Court of the United States

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No. 82-437

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a)[1] is reported at 683 F.2d 1129. The district court's May 30, 1980 memorandum and order (Pet. App. 47a-51a) is unreported. The final opinion of the district court (Pet. App. 23a-46a) is reported at 518 F. Supp. 527.

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[1]"Pet." and "Pet. App." refer to the petition and appendix in No. 82-437.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on May 14, 1982. On July 17, 1982, Justice Blackmun entered an order extending the time within which to file a petition for a writ of certiorari to and including September 11, 1982. The petition in No. 82-437 was filed on September 10, 1982. The petition in No. 82-635 was filed on October 8, 1982.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the preclusive effect of a 1979 decision by the en banc Minnesota Supreme Court that the State of Minnesota is without authority to regulate hunting and fishing activities of Chippewa Indians in 32 townships comprising the diminished White Earth Reservation. *State of Minnesota* v. *Clark*, 282 N.W.2d 902, cert. denied, 445 U.S. 904 (1980).

The *Clark* litigation began in 1972, when two members of the White Earth Band of Chippewa Indians were arrested for violations of Minnesota state law regulating hunting and fishing. Between 1972 and 1976, 11 additional Band members were charged with similar violations, all of which

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[2]The petition in No. 82-635, which is styled a "cross-petition," was filed by the State of Minnesota, certain State officials and Becker County, Minnesota, ostensibly for the sole purpose of ensuring that those parties would receive the benefit of any favorable ruling the petitioners in No. 82-437 might obtain (see 82-635 Pet. 7-8). In our view, however, the petition in No. 82-635 is not a proper cross-petition under Rules 19.5 and 19.6 of the Rules of this Court because it presents the identical issue presented by the petitioners in No. 82-437. Accordingly, the additional 30 days for filing a cross-petition provided by Rule 19.5 do not inure to the benefit of the petitioners in No. 82-635 and their petition, which was filed more than 90 days after entry of the judgment of the court of appeals, is therefore out of time. Nevertheless, because both petitions present the same issue, this brief is responsive to both filings.

were alleged to have occurred on land located within the 32 townships of the White Earth Reservation. 282 N.W.2d at 903-904.

Following the initiation of the state prosecutions, the White Earth Band, on March 4, 1974, and the United States, on December 5, 1974, filed complaints in the United States District Court for the District of Minnesota against the State of Minnesota and various Minnesota state officials seeking declaratory and injunctive relief to the effect that the State lacks jurisdiction to regulate Indian hunting, fishing, trapping, and gathering within the White Earth Reservation. [3] Three Minnesota counties, Becker, Clearwater and Mahnomen, and four individual owners of land located within the boundaries of the Reservation were permitted to intervene as defendants in the Band's action. Subsequently, the district court consolidated the two federal actions and held them in abeyance, by agreement of the parties, while the issue was litigated through the state court system in the context of the *Clark* prosecutions, in which all of the parties to the federal proceedings actively participated (Pet. App. 6a-7a, 25a, 49a).

The Minnesota Supreme Court issued its decision in *Clark* on August 3, 1979, concluding that the State lacks jurisdiction to enforce its fish and game laws against enrolled members of the White Earth Band within 32 of the 36 townships comprising the White Earth Reservation as established by the Treaty with the Chippewa Indians, Mar. 19, 1867, 16 Stat. 719 (Treaty of Mar. 19, 1867).[4]

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[3]The Band also sought a declaration that it and the Chippewa Tribe have exclusive jurisdiction to regulate those activities by non-members within the reservation (Pet. App. 7a).

[4]The court expressly limited its decision to the 32 townships. See 282 N.W.2d at 906 n.13. The four remaining townships of the original reservation were ceded by the Indians to the United States in 1889 and have a history distinct from that of the 32 (see page 10, *infra*). Following

Specifically, the court held (282 N.W.2d at 905-908) that the Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 *et seq.* (the Nelson Act), had not disestablished the White Earth Reservation and that, therefore, the lands within the reservation's boundaries constitute "Indian country," as defined by 18 U.S.C. 1151(a). The court further found (282 N.W.2d at 908-909) that the Indians possess hunting and fishing rights under the Treaty with the Chippewa Indians, May 7, 1864, 13 Stat. 693, and the Treaty of Mar. 19, 1867, 16 Stat. 719. Accordingly, the court concluded, application of the State's regulatory authority to these Indian activities is precluded by 18 U.S.C. 1162(b), which provides that Minnesota's jurisdiction over criminal offenses committed within "Indian country" shall not "deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

On May 30, 1980, the district court in the consolidated federal cases granted the Band's motion for an order precluding relitigation of the issues decided in *Clark* (Pet. App. 47a-51a). The district court subsequently issued a final memorandum and order disposing of the remaining issues in that case (*id.* at 23a-46a).[5]

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the decision in *Clark*, the United States amended its complaint to reduce the amount of land over which it claimed the State lacked jurisdiction to regulate the gaming activities of the Band and Tribe from 36 to 32 townships, so that its amended complaint sought no greater relief than that granted in *Clark* (Pet. App. 26a). The Band continued to claim a right to be free from State regulation of hunting and fishing on all 36 townships of the original reservation.

[5]Relying on this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), the court held (Pet. App. 26a-27a) that the Band lacks jurisdiction to regulate hunting, fishing, trapping and wild rice gathering by nonmembers of the Band on reservation lands held in fee by non-Indians. In addition, the court held that the White Earth Reservation does not include the four northeastern townships ceded to the

The court of appeals affirmed the district court in all respects (Pet. App. 1a-22a).[6] Specifically, the court rejected petitioners' argument that the doctrine of collateral estoppel should not preclude relitigation of the issues decided in *Clark* because its application would be unjust and contrary to the underlying public interest (*id.* at 9a-13a).

ARGUMENT

Throughout the proceedings in this case, petitioners have conceded that all the technical prerequisites to application of the doctrine of collateral estoppel are satisfied (see Pet. App. 9a-10a, 49a).[7] They nevertheless contend (Pet. 8-20) that the courts below erred in applying that doctrine to preclude relitigation of the issue of reservation disestablishment decided in *Clark*. Petitioners' claim is without merit and, in any event, the question they present has little significance beyond this particular case. Further review by this Court is therefore not warranted.

United States in 1889 pursuant to the Nelson Act (Pet. App. 27a-35a); that the Band has jurisdiction to regulate (but not through the imposition of criminal or quasi-criminal sanctions) hunting, fishing, trapping and wild rice gathering by non-members on land owned by or held in trust for the Band or individual Indians (*id.* at 35a-40a); and that the State also has authority to regulate these activities by non-members on Indian-owned or trust land (*id.* at 40a-45a).

[6]The State parties and intervening counties and individuals appealed from the district court's order precluding relitigation of the disestablishment issue decided in *Clark*. The Band appealed from the district court's rulings that four townships were not included in the White Earth Reservation and that the State also had authority to regulate the hunting, fishing, trapping and wild rice gathering activities of non-members of the Band on Indian-owned or trust lands (see note 5, *supra*). Pet. App. 5a.

[7]As the district court noted (Pet. App. 49a), "all the parties participated in the state action, the issues were fully and fairly litigated, the state court action resulted in a valid and final judgment, and the resolution of the issues was essential to that judgment." See also *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979).

1a. Petitioners' principal contention (Pet. 8-13) is that the legal principles controlling the disestablishment issue have changed significantly since *Clark* was decided and that an exception to the issue preclusion rules therefore is warranted under *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). See also *Montana* v. *United States*, 440 U.S. 147, 161 (1979). In support of this claim, petitioners rely (Pet. 11-13) on *United States* v. *State of Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), aff'd *sub nom. Red Lake Band of Chippewa Indians* v. *State of Minnesota*, 614 F.2d 1161 (8th Cir.) (per curiam), cert. denied, 449 U.S. 905 (1980), which they claim represents the culmination of a change in the law assertedly begun in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), and *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

As the court of appeals noted (Pet. App. 11a), however, the *Rosebud* and *DeCoteau* cases, as well as the district court's decision in *United States* v. *State of Minnesota*, *supra*, all were decided prior to the *Clark* decision and, indeed, were cited and discussed by the Minnesota Supreme Court in its opinion in that case. 282 N.W.2d at 906, 907, 908. While the decision of the court of appeals in *Red Lake Band*, *supra*, was rendered after *Clark*, that one-page per curiam opinion, which merely affirmed "on the basis of the trial court's well reasoned decision" (614 F.2d at 1162), cannot be construed as constituting a significant change in the law, particularly because it is the language of the district court opinion on which petitioners are relying (Pet. 13) and because the *Clark* court explicitly followed that district court decision to the extent it was applicable. See 282 N.W.2d at 908. Petitioners' contention thus reduces to an argument that the *Clark* court misapplied existing law. But an allegation that a decision depends on an erroneous view of the law provides no exception to the doctrine of collateral estoppel. See *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981).

b. In any event, the decision in *Clark* is not inconsistent with the cases cited by petitioners. Indeed, the Minnesota Supreme Court expressly relied on *DeCoteau* v. *District County Court, supra,* 420 U.S. at 444-445, and *Rosebud Sioux Tribe* v. *Kneip, supra,* 430 U.S. at 586-587, in holding (282 N.W.2d at 907) that "the standard to be applied in resolving the disestablishment issue is whether a clear congressional intent to terminate the reservation is discernible either from the face of the act, the surrounding circumstances, or the act's legislative history."[8] Applying this standard, the court examined the records of negotiations with the Indians incident to implementation of the Nelson Act and concluded that neither the government nor the Indian negotiators believed the Act would have the effect of disestablishing the White Earth Reservation. See 282 N.W.2d at 907 & n.14.

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[8]The findings of disestablishment in *DeCoteau* and *Rosebud* were based on statutes other than the Nelson Act, which is at issue here. Rather, those cases involved the Act of Mar. 3, 1891, (ch. 543, 26 Stat. 989 *et seq.*), and the Acts of Apr. 23, 1904 (ch. 1484, 33 Stat. 254 *et seq.*), Mar. 2, 1907 (ch. 2536, 34 Stat. 1230 *et seq.*) and May 30, 1910 (ch. 260, 36 Stat. 448 *et seq.*), respectively. The *Clark* court also distinguished *DeCoteau* on the following grounds (282 N.W.2d at 908; footnote omitted):

> The most significant distinction between *DeCoteau* and the present case lies in the differing understandings of the Lake Traverse and the White Earth Indians. In *DeCoteau,* the Court cited a newspaper account of the 1889 negotiations reporting that the Sisseton-Wahpeton Indians had stated, " 'We never thought to keep this reservation for our lifetime.' " 420 U.S. 433, 95 S. Ct. 1087, 43 L.Ed.2d 307. In sharp contrast, the defendants here have persuasively shown that the White Earth Indians desired to keep the reservation intact and understood that it would remain so except for the four townships of pine preserves ceded outright to the United States. Accordingly, we believe that the two cases are markedly different from one another and thus the *DeCoteau* holding is not controlling in this case.

Moreover, petitioners err in suggesting (Pet. 11) that *United States* v. *State of Minnesota, supra,* touches on the question of the disestablishment of the 32 townships presented here. The issue in *Minnesota* was whether the Red Lake Band retained hunting and fishing rights in lands the Band had ceded to the federal government in 1889 and 1904. 466 F. Supp. at 1383, 1385. Accordingly while that case may have some relevance to the question of the Band's hunting and fishing rights in the four northeastern townships of the White Earth Reservation that were ceded pursuant to the Nelson Act (see note 4, *supra*; page 10, *infra*), it has little bearing on the question of Indian rights in the 32 townships that were never ceded.

Furthermore, contrary to petitioners' assertion (Pet. 11), the statement in *Minnesota* that the purpose of the Nelson Act was to "restore the land to the public domain" (466 F. Supp. at 1386 n.1, 1387), is no indication that the *Minnesota* court viewed the Nelson Act as accomplishing reservation disestablishment. Viewed in the context of the land cessions with which that case was concerned, the statement merely reflects the court's conclusion that, in selling lands to the federal government, the Indians had forfeited their hunting and fishing rights therein.

2. Petitioners also contend (Pet. 13-14, 18-19) that precluding relitigation of the issue decided in *Clark* will serve only to perpetuate inconsistent decisionmaking with respect to the disestablishment effect of the Nelson Act. But *DeCoteau* and *Rosebud* make clear that different conclusions concerning the disestablishment vel non of particular reservations inevitably will result, not because of differing interpretations of the law, but from the different factual situations surrounding the transactions at issue. The teaching of those cases is that, with respect to a particular reservation and particular tribe or band, congressional intent

and Indian understanding are to be gleaned from the "surrounding circumstances," as well as from the language of the congressional enactment. See *Rosebud Sioux Tribe* v. *Kneip, supra,* 430 U.S. at 586-587; *DeCoteau* v. *District County Court, supra,* 420 U.S. at 444. This is particularly true with respect to the Nelson Act, which treated various bands or tribes and reservations differently and which contemplated that separate agreements would be negotiated with the individual tribes or bands. See Sections 1 and 3 of the Nelson Act, 25 Stat. 642-643.[9] Accordingly, the suggestion that the Nelson Act requires a uniform conclusion regarding disestablishment of all the Indian reservations with which the Act deals is without foundation. As the court of appeals noted (Pet. App. 12a-13a), there is no inconsistency where different factual situations compel different results.

Once a court of competent jurisdiction has determined the question of disestablishment of a given reservation in the context of its particular historical and factual setting, relitigation of that status would undermine reliance on judicial decisionmaking. See *Allen* v. *McCurry,* 449 U.S. 90, 95-96 (1980). Contrary to petitioners' claims, therefore, the need for consistency militates in favor of applying the doctrine of collateral estoppel here.[10]

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[9]Moreover, the White Earth Reservation has a unique historical status. The Nelson Act contemplated that the various bands and tribes of the Chippewa Indians in Minnesota, with the exception of the Chippewa on the Red Lake Reservation, would leave their reservations and move to the White Earth Reservation. See Section 3 of the Act, 25 Stat. 643.

[10]We note that refusal to apply the doctrine in this case would result in a direct federal-state conflict if, on relitigation, petitioners secured a favorable judgment on the disestablishment question. In that case, a judgment by the highest state court would prohibit the State from regulating or interfering with Band hunting and fishing activities on the 32 townships whereas an outstanding federal court judgment would subject Band hunting and fishing to state regulation.

3. Finally, petitioners argue (Pet. 14-18) that, because the question of the reservation status of the four northeastern townships remained before the district court,[11] reexamination of the status of the 32 townships would not have worked an unnecessary or uneconomical use of judicial or private resources. Accordingly, petitioners contend, precluding relitigation did not serve the purposes of the doctrine of collateral estoppel. Petitioners' claim founders on the realities of this case. The four townships ("pine lands") have a significantly different history from that of the 32, and their status therefore presents a distinct and separate issue. They were the subject of different provisions in the Nelson Act and the agreement pursuant to it. Nelson Act, Section 4, 25 Stat. 643-644; H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 37 (1890). In addition, the four townships were not set apart for allotments to Indians, and no allotments were ever made in them (Pet. App. 12a, 34a). As petitioners acknowledge (Pet. 16), the four townships were ceded in 1889, whereas the remaining 32 townships were expressly reserved.

Conceding (Pet. 17) that the 32 townships and the four townships are the subjects of different provisions of the Nelson Act, petitioners nevertheless insist that, because "the same legislative documentation and the same administrative materials" are critical to both issues, relitigation of the status of the 32 townships would not have unnecessarily taxed judicial and private resources (Pet. 18). Under this theory, if a party raised a single issue not previously litigated whose disposition turned on documents that would be significant in deciding a number of other issues already disposed of, the latter issues could be relitigated and the doctrine of collateral estoppel circumvented simply because of the relevance of these documents. But such a result would

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[11]See note 5, *supra*.

undermine public confidence in judicial decisionmaking and would afford litigants " 'more than one full and fair opportunity for judicial resolution of the same issue.' " *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 328 (1979), quoting *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328 (1971). Moreover, insofar as judicial resources are primarily expended not in collecting the relevant documents or even in reading through them, but rather in analyzing and applying them to a particular issue, acceptance of petitioners' "overlapping documentation" theory would result in the unnecessary expenditure of judicial as well as private resources.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Nos. 82-437 and 82-635

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA, and ELMER H. WINTER, et al.,

Petitioners,

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

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PRELIMINARY STATEMENT

Certain additions to the original statement of facts are necessary in order to clarify matters raised by the Respondents United States and White Earth Band.

The United States places considerable emphasis upon the 1977 agreement of the parties to pursue the boundary issue in state court, and suggests that "all of the parties to the federal proceedings actively participated. . ." in that State court litigation. Brief in Opposition at 3. To the contrary, however, neither the United States nor the Band participated at any stage in the Clark litigation despite its overriding significance. See, e.g., State v. Clark, 282 N.W.2d 902, 903 (Minn. 1979), cert. denied, 445 U.S. 904 (1980) (listing of counsel for parties on whose behalf briefs or argument were made). In these circumstances, the reliance placed on the 1977 agreement by the United States is, in the petitioner's view, troubling. To be sure, mutuality is no longer required for application of collateral estoppel (see, e.g., Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 329-31 (1979)), and there is some question as to whether the United States could have, had it interjected itself into the Clark case, controlled that litigation sufficiently to actuate the principles of estoppel. See, e.g., Montana v. United States, 440 U.S. 147, 155 (1979). Nevertheless, the complete inaction of the United States — and, for that matter, the Tribe — in face of the agreement to turn to the State courts for resolution of the issue is very much akin to the situation in which a plaintiff takes a "wait and see" attitude to related litigation -- a

situation which has been expressly disapproved of by this Court in Parklane Hosiery Co., Inc., supra, 439 U.S. at 329-30.

One other matter bears mention here. The Band appears to suggest that the Defendants below freely turned to the State courts for resolution of the boundary issue. The record shows, however, that was not altogether the situation. What is perhaps most significant in this regard is that there was no understanding or agreement among the parties to defer to the State courts until after the State trial court granted the Defendants' motion to dismiss in the Clark litigation.[1] Indeed, prior to that time, all the parties had indicated to the District Court that the preferred forum for the cases was Federal Court. See, e.g., Transcript of June 23, 1975 Hearing, supra at 23-29. Because the doctrines of collateral estoppel and stare decisis arguably became applicable when the State trial court dismissed the Clark prosecution for want of jurisdiction (see generally 1B Moore's Federal Practice, ¶0.416[1]), the Defendants below were no longer free to ignore the State court proceedings.

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1. Although the State and Counties pled comity in their Answers, counsel for the State and Counties did not actively seek deferral to the State court prior to the State trial court decision. See, e.g., Transcript of June 23, 1975 Hearing at 4-12, 23-29 (the relevant portions of which are appended to the Reply Brief of the Appellee/Cross-Appellant Counties filed in the Court of Appeals below). The individual Intervenor Defendants, Elmer Winter, et al., never sought deferral.

ARGUMENT

The United States argues that the Clark decision is not inconsistent with, and, in fact, relies upon DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). Br. in Opposition at 7. This assertion completely ignores the primary thrust of the Petition. The Petitioners do not claim that the change-in-law exception to the doctrine of collateral estoppel is applicable because the Minnesota Supreme Court did not rely on DeCoteau or Rosebud, nor could they since those two cases predate Clark.[2] Instead, the position of the Petitioners is that the Clark decision is predicated, in large part, upon cases espousing an interpretation of the Nelson Act — the surplus lands act at issue — wholly at odds with the interpretation proffered in the more recent case law which includes the lower court decisions in this case. See Pet. at 10-12. And, that the construction given the Nelson Act in the more recent case law is significant in this context goes without question. Although not necessarily dispositive, the conclusion of these cases that the overall purpose of the Nelson Act was to restore lands to the public domain is of obvious significance in

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2. This is not to say, though, that the Petitioners agree that the Clark Court correctly applied the teaching of Rosebud and DeCoteau in resolving the disestablishment issue — they do not. However, whether the Clark case was properly decided on the basis of Rosebud and DeCoteau is not now before this Court.

the disestablishment context. See, e.g., Pet. at 11. See also Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973).

In addition, the United States incorrectly claims that precluding relitigation will not perpetuate inconsistent decision-making. Br. in Opposition at 8. It is certainly true that the cases in this context advise that different conclusions as to disestablishment often result from different factual histories and not from differing interpretations of the law. This counsel is inapplicable here, however, as the differing results are, in large measure, the product of differing interpretations as to the underlying purpose of the very act at issue — the Nelson Act. And, in this regard, no court has counseled that different conclusions as to the baseline purpose of a particular surplus land act is an acceptable result.[3]

CONCLUSION

Wherefore, for the foregoing reasons and the reasons set forth in the Petition and the supporting Amici

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3. The United States also argues that the Cross-Petition in No. 82-635 is not a proper cross-petition, and therefore, was untimely filed. This assertion finds no support in the rules of this Court as there is nothing in Rule 19 — the rule cited by the United States — or any other rule which even suggests that the issues presented in a petition cannot be raised by a respondent in a cross-petition. Indeed, the express language of Rule 19.5 appears to indicate that a respondent may properly cross-petition for review of any issue, whether raised by another party or not.

brief, the Petition for a Writ of Certiorari should be granted.

Dated this 19th day of November, 1982.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Nos. 82-437 and 82-635

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA; and ELMER H. WINTER, et al.,

Petitioners,

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA; and JOSEPH N. ALEXANDER, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF OF THE COUNTIES OF BELTRAMI, CASS, HUBBARD, KOOCHICHING, LAKE OF THE WOODS, MARSHALL, AND POLK, MINNESOTA, AS AMICI CURIAE IN SUPPORT OF THE PETITION AND CROSS-PETITION

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BRIEF OF THE COUNTIES OF BELTRAMI, CASS, HUBBARD, KOOCHICHING, LAKE OF THE WOODS, MARSHALL, AND POLK, MINNESOTA, AS AMICI CURIAE IN SUPPORT OF THE PETITION AND CROSS-PETITION

INTEREST OF THE AMICI COUNTIES

The Counties joining herein submit this brief in order to express their interest in the basic issues raised by the Petitioners and to urge that the petition be granted. As explained in the petition, at the heart of this case is the surplus land act of January 14, 1889 (25 Stat. 642), commonly known as the Nelson Act. The significance of this Act is that it provided for the cession of all of the lands of the Chippewa reservations in Minnesota not needed for allotments — twelve reservations in all encompassing close to five million acres in 1889. See, e.g., Pet. at 8; Pet. App. at 52a. See generally H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1890).

In addition to the White Earth Reservation (as established by Treaty of March 19, 1867, 16 Stat. 719), among the reservations affected by the Nelson Act were the Red Lake Reservation (as established by the Treaty of October 2, 1863, 13 Stat. 667), essentially all of what

is known as the Greater Leech Lake Reservation,[1] the Bois Fort — or Nett Lake — Reservation (as established by the Treaty of April 7, 1866, 14 Stat. 765), and the Deer Creek Reservation (as established by Executive Order of June 30, 1883). The 1863 Red Lake Reservation encompasses significant portions of the Amici Counties of Beltrami, Lake Of The Woods, Koochiching, Marshall, and Polk; the Greater Leech Lake Reservation encompasses significant portions of the Amici Counties of Beltrami, Cass, and Hubbard; and the 1866 Bois Fort Reservation and the 1883 Deer Creek Reservation encompass a significant portion of Koochiching County.

As will be explained in greater detail below, the primary concern of the Amici Counties is the ultimate interpretation given the Nelson Act, which in turn involves the fundamental problem presented by this case — the relationship of the conflicting case law respecting the disestablishment effect of the Nelson Act. And, of course, the disestablishment issue concerns the Amici Counties because of the effect of reservation status, not only in regard to State and local jurisdiction but, just as importantly, in regard to the governmental

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1. The Greater Leech Lake Reservation includes the historic Leech Lake, Lake Winnebagoshish, Cass Lake, and White Oak Point Reservations as established by the Treaty of February 22, 1855 (10 Stat. 1165), and subsequently modified by the Treaty of May 7, 1864 (13 Stat. 693) and the Treaty of March 19, 1867, supra.

authority of resident bands over non-members as well.[2] See Pet. at 6-7.

ARGUMENT

The Petition makes evident that there exist two conflicting lines of cases respecting the Nelson Act. Pet. at 9-12. On the one side is Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971) and its progeny — State v. Forge, 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978),[3] and the state court decision at issue in this litigation, State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980) — in which it was concluded that the underlying purpose of the Nelson Act was not disestablishment. See, e.g., Pet. at 10-11. On the other side are the District Court and the Court of Appeals decisions in United States v. Minnesota, 466 F. Supp.

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2. This latter concern results from the recent trend in the case law recognizing that Indian tribes retain some forms of civil jurisdiction over non-Indians and their lands within reservation boundaries. See, e.g., Montana v. United States, 450 U.S. 544, 565-66 (1981).

3. The reservation area which was at issue in Leech Lake Band and Forge was the Greater Leech Lake Reservation. As pointed out in n.1, supra, this Reservation encompassed not only the area of the original Leech Lake Reservation, but the area of the historic Cass Lake, Lake Winnebagoshish, and the White Oak Point Reservations as well. See, e.g., Leech Lake Band of Chippewa Indians v. Herbst, supra, 334 F. Supp. at 1003.

1382 (D. Minn. 1979), aff'd sub nom. Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980),[4] as well as in this case, in which essentially the opposite conclusion is reached. See, e.g., Pet. at 11-12; Pet. App. at 14a n.5, 29a. It is evident then, that a fundamental conflict as to the proper interpretation of the Nelson Act in the disestablishment context presently exists in the case law.

It is the view of the Amici Counties that the more recent federal decisions — Red Lake Band, United States v. State of Minnesota, and the lower court decisions in this case — effectively overrule the earlier decisions to the contrary. The Counties, therefore, agree with the Petitioners' assertion that these federal decisions constitute a fundamental change in perspective as to the purpose of the Nelson Act. This, we submit, is the type of "major doctrinal shift[ ]" (Montana v. United States, 440 U.S. 147, 162 (1979)), to which the doctrine of collateral estoppel was not intended to apply.

What concerns the Amici is that in applying collateral estoppel in this case, the lower courts refused to recognize that a fundamental shift has occurred. The effect of this is that Leech Lake Band, Forge, and Clark are left intact, and are, therefore, arguably still good

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4. At issue in United States v. Minnesota were those portions of the original Red Lake Reservation ceded under the Nelson Act and a 1904 surplus land act. See Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161, 1162 (8th Cir.), cert. denied, 449 U.S. 905 (1980).

law. A further troubling aspect of what the Amici consider to be an unnecessarily narrow and rigid application of issue preclusion is that it may well result in the very evils the change in law exception is designed to avoid — inequitable treatment, discriminatory distinctions, and litigious confusion. See Pet. at 13-14. Of particular concern to the Amici in this regard is, in view of the fact that the Nelson Act affected some twelve reservations in all, the likelihood that further inequitable treatment will continue.[5] And, although unlikely, this "litigious confusion" could ultimately undermine the favorable decisions regarding the Nelson Act in both Red Lake Band and this case.

The Counties believe that if this Court reverses the lower court and recognizes that the change in law exception is applicable, the steady stream of cases respecting the Nelson Act which have reached this Court in recent years will not likely come to an end. On the other hand, if the problem regarding the proper interpretation of the Nelson Act is not laid to rest in this case, it is probable that the issue will again be

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5. Although the Amici believe that the more recent federal decisions discussed above govern any subsequent examination of the Nelson Act in the disestablishment context, if Leech Lake Band and its progeny are left intact, these latter cases could be found to govern with the federal decisions confined to their facts. Cf. Opinion of the Court of Appeals, Pet. App. at 12a (differing conclusions as to disestablishment of particular reservations result from different fact situations).

presented to this Court in the context of future litigation involving the other historic reservations affected by that Act. In summary, the issues presented by the Petition for Writ of Certiorari are of paramount importance to the Amici Counties. The Counties, therefore, share the concerns of the Petitioners regarding these issues, and adopt the arguments stated therein.

CONCLUSION

For the reasons set forth above, as well as in the Petition, the Amici Counties respectfully urge that Certiorari be granted in order to resolve the important questions presented by this case.

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